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AN ALPHABETICAL EPITOME OF THE COMMON LAW OF ENGLAND;

SO FAR AS IT RELATES TO THE

SECURITY OF THE PERSONS, PROPERTY AND PRIVILEGES OF INDIVIDUALS.

Directing, in a great Variety of Inſtances, not only to the ſeveral Points in which the Law does, or does not give a Remedy, but alſo to the particular Species of Remedy the Law has provided for diſtinct Injuries and Wrongs: Interſperſed with many other uſeful Articles neceſſary to be known for a proper Diſcharge of the ſeveral Duties of public and private Life.

WITH AN ADDENDA;

Shewing the Law reſpecting Costs in the Proſecution of Actions, and pointing out the Quantum of Coſts allowed, &c.

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PREFACE.

AMONG the variety of publications which have already appeared, none are more extenſively uſeful than thoſe which tend to inſtruct mankind; and none can more effectually anſwer this great end, than ſuch as are ſquared to the abilities, both mental and pecuniary, of the public in general.

Such works therefore are little ſuited to the general end of public inſtruction, that go beyond the reach of the capacities and pockets of the public. How far large folio's are adapted to this purpoſe the fact muſt ſpeak, which tells us, that the public has neither power, will, nor time to gain any inſtruction from them. Voluminous works are better helps to thoſe who have no other employ but to pleaſe themſelves, than to thoſe whoſe time is employed in the diſcharge of thoſe duties upon which the being of themſelves and their families depend.

I intend to bring this down to the preſent caſe: and muſt inſiſt, that as it is abſolutely neceſſary that men who are amenable to the laws ſhould know what thoſe laws are, and as the public in general are ſo amenable, and are in that reſpect the proper objects for legal inſtruction, ſo it is impoſſible they ſhould be taught what they are ſubject to, without they are reduced to ſuch a ſtate as will empower them in their circumſtances to ſtudy and inveſtigate them.

It may perhaps be ſaid, I would make them all lawyers: the intereſt indeed of ſome may move them to wiſh it may not be ſo; for I am perſuaded, if men knew the law, they would avoid many things which, being done, ſubject them to its diſpleaſure, and the malice of their enemies. Be ſome men offended or not, this is certain, that as the public intereſt is at all times to be preferred to private advantages; ſo, in the preſent caſe, *this* ſhall be offered as a ſacrifice to *that*: whether it be an effectual and prevailing one is not my pro-

vince to determine, nor can I do it without incurring the juſt imputation of pride and ſelf-conceit: it ſhall ſuffice for me to ſay, I have directed it to this end: if I have failed, I ſhall not ſtand the foremoſt on the liſt; and my modeſty will permit me to ſay, that every man ſhould receive the public thanks when he has intended a public ſervice, and thoſe thanks cannot be more plainly ſhewn, nor more to the Author's *pleaſure*, than by a due encouragement of the work.

When I ſpeak of the public, I mean to take in the whole of thoſe who have a moderate ſhare of common ſenſe, and have had education enough to read their mother tongue; and when I do this, I am not to be underſtood to confine the intended uſefulneſs of my work to that line of beings who are no otherwiſe concerned with our laws than as they are ſubject to, and have their remedy in them; but to recommend it as a uſeful common place-book for thoſe who are more immediately concerned in the proſecution and defence of legal ſuits.

The PUBLIC's Servant,

THE AUTHOR.

AN
Alphabetical Epitome
OF THE
COMMON LAW
OF
ENGLAND.

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ABDUCTION. See KIDNAPPING.

ABUSE. See FAME.

ACCEPTANCE. The acceptance of another thing has been held good where the condition of a bond is to pay *money*; as, in an action of debt on a bond conditioned for the payment of 10l. at such a day, the defendant pleaded, that *before the day* he gave the plaintiff a horse in satisfaction of the money, which he accepted, and it was held good. *Dyer* 56.

A bond may be satisfied before the day mentioned in the condition; but then the defendant must plead it specially. *Moor* 366. *Dyer* 213.

And acceptance of a lesser sum may be in satisfaction of a greater, if it be *before* the day on which the money becomes due; but at, or after the day of payment, then a lesser sum though accepted shall not be a satisfaction for a greater sum. 3 *Bulst.* 301. 5 *Rep.* 517. 1 *Lutw.* 501.

If a man is bound in 200 quarters of corn, with a condition to pay 20l. the obligor may by agreement give the obligee any other thing in satisfaction of the money; but if the condition be to pay 100 quarters of corn, there the acceptance of money, or any other thing, will not be good, because the contract was not made for money, but for a collateral thing. 9 *Rep.* 79.

Where a woman hath a title to an estate of inheritance, as dower, &c. she shall not be barred by the acceptance of

any collateral satisfaction or recompence. 4 *Rep. Vernon's Case.*

No one is obliged to accept a thing by parcels which he has a right to in gross; as, if A. is bound to deliver 10 pipes of wine to B. and tenders him a part thereof only; B. is not compellable to accept it. 3 *Salk.* 2.

It has been adjudged that the acceptance of one bond cannot be pleaded in satisfaction of another bond. *Cro. Eliz.* 716, 717. *Cro. Car.* 85. *Moor* 872. But this is where given by the obligor himself, for it can when given by others. 1 *Mod.* 221. See ACCORD, ALIENATION, BOND, and LEASE.

ACCEPTANCE of bills. See BILLS of *Exchange.*

ACCESSARIES. Accessaries before the fact are those who being absent when the offence is committed, do nevertheless procure, counsel, command, or abet another to commit a felony: and accessaries after the fact are such as, knowing the felony to be committed, relieve, comfort, or assist the felon.

Statutes, excluding the principals from the benefit of clergy, do not thereby exclude the accessaries. 2 *Hawk. P. C.* 342.

If a person knows that a man hath committed a felony, and does not discover it, this does not make him accessary; but it is a misprison of felony, for which he may be indicted, fined, and imprisoned. 1 *H. H.* 618. And such assistance, &c. that will make a man accessary must be in order to hinder his being brought to public justice. 2 *Hawk. P. C.* 317.

There are no accessaries in petit larceny and trespass. 1 *H. H.* 613.

ACCIDENTS. Relief may sometimes be had against accidents in a Court of Law: as the loss of deeds; mistakes in receipts or accounts; wrong payments; deaths which make it impossible to perform a condition literally, &c. &c. and many cannot be relieved even in a Court of Equity; as, if by accident a recovery is ill suffered, a devise ill executed, a contingent remainder destroyed, or a power of leasing omitted in a family settlement. 3 *Black. Com. p.* 431.

ACCORD. Accord is strictly an agreement executed between two parties, by which satisfaction is rendered and accepted for a trespass, &c. done by one to the other; and the most general rules respecting accords are, 1. That a present satisfaction, that is, a satisfaction already made is a good plea

to an action for the treſpaſs; but if the treſpaſſer barely promiſes a future ſatisfaction, the injury and remedy remain 'till the ſatisfaction is made. And if an accord be that the defendant ſhall do a certain thing at a day to come, in ſatisfaction of an action, if he doth perform it at the day, this is a good bar of the action, though it was executory at the time of the accord made, in as much as he hath accepted it in ſatisfaction. 1 *Roll. Abr.* 129. 2. That accord with ſatisfaction is no good plea to a real action, for a right or title to a freehold cannot be barred by any collateral ſatisfaction. 4 *Co.* 1. 9 *Co.* 79. *b.* 3. That an accord with ſatisfaction is a good plea in all actions where damages only are to be recovered. 6 *Co.* 44. *Dyer* 75. 4. That the ſafeſt way is to plead it by way of ſatisfaction, and not by way of accord. 5. That it muſt appear to be advantageous to the party, therefore it is no good plea to an action of treſpaſs for taking the plaintiff's cattle, to ſay that there was an accord that the plaintiff ſhould have his cattle again, for this is not any ſatisfaction. 1 *Roll. Abr.* 128. But it is, if he were to drive them to a certain place; ſo that it would be a charge to him to do it. 2 *Roll. Rep.* 96. An accord that each of them ſhould be quit of actions againſt the other is not good, becauſe there is no ſatisfaction. 1 *Roll. Abr.* 128. *Stile* 245. But to accord that each ſhould give the other a quart of wine *in ſatisfaction of actions* is good. 1 *Roll. Abr.* 128. 6. It ſeems that a tender to perform the accord, or part of it, the other being done, or a willingneſs to do it, is not a good plea, for the accord muſt be executed. *Jones* 6. *Sheppard v. Lewis. Raym.* 203. *Mod.* 69. 2 *Keb.* 690. See ACCEPTANCE.

ACCOUNT. This action lay againſt receivers, &c. who refuſed to render their accounts, and which, on account of many inconveniencies attending it, is almoſt totally diſuſed: and is ſupplied by actions of debt, caſe, covenant, &c. Or, if it be a perplexed and intricate matter, recourſe is frequently had to a Court of Equity, where it meets with a very commodious adjuſtment, the plaintiff being intitled to every neceſſary diſcovery upon the defendant's oath, and the defendant allowed to diſcount all his reaſonable allowances, &c. by his own oath.

ACCOUNTS. Where two have accounted together as to their dealings with each other, an action of aſſumpſit is the proper remedy for the money. *Cro. Jac.* 69. So it is if one

gives money, or delivers goods to another to merchandize therewith, and he promiſes to render an account. 1 *Salk.* 9. And if a tenant ſettles an account of the arrears of rent with his landlord, and promiſes to pay him the ſum in arrear, an action of aſſumpſit lies on the promiſe. 1 *Roll. Abr.* 9. 2 *Keb.* 813.

Account-Books. Books of account, or ſhop-books, are not allowed of themſelves to be given in evidence for the owner; but a ſervant who made the entry may have recourſe to them to refreſh his memory: and if the ſervant be dead (who was accuſtomed to make thoſe entries) and his hand be proved, the book may be read in evidence. *Law of Niſi Prius, p.* 266.

Act. In many of the circumſtances of human life, queſtions ariſe who are to do the firſt act for the accompliſhment of ſome neceſſary legal end: and with reſpect to theſe it may be laid down as a general rule, that the law will oblige him to do the firſt act who has the excluſive ability to do it; or who according to the common courſe of legal proceedings ſhould properly do it.

If one bind himſelf to give ſuch a releaſe, at ſuch a time, it is at his peril to prepare it. *Cro. Eliz.* 716.

If one bind himſelf before ſuch a time to levy a fine of certain lands to the obligee, it has been held that the obligee muſt ſue out the writ of covenant to make himſelf capable of the fine. *Heb.* 48. 1 *And.* 300.

Where one binds himſelf for performance of covenants, &c. and the covenant is that the obligor before ſuch a day ſhall make a further aſſurance of lands to the obligee at the obligee's coſts, the obligor having it in his choice what aſſurance he would make, he ought not to ſtay for the tender of coſts, but ſhould give notice to the obligee what aſſurance he intends to make, and then the obligee is to ſupply the coſts. *Moor* 454.

If one binds himſelf to another to deliver 200 cwt. of hops, and that the obligee is to chuſe them out of 24 bags of the obligor's own growing, the obligee is to do the firſt act, (viz.) to require the obligor to ſhew the 24 bags that he may make his choice. *March* 24.

Where A. and B. agree for a ſale which is to be in writing, and that A. ſhall pay B. 600l. viz. 20l. in hand, and the reſt upon executing the writing, B muſt tender the writing to A. becauſe he has undertaken to ſell his property

by a writing; ſo where a covenant is to enter into a bond, the covenantor is to prepare and tender it. 4 *Mod.* 188. 3 *Lev.* 319. *Dyer* 297. *Hob.* 67, 88, 106. *Cro. Eliz.* 292, 543. 2 *Cro.* 503. 2 *Saund.* 351. *Sid.* 178.

Where a man covenants to ſeal and deliver a deed, he is bound to put it in writing; but if he refuſe, the covenantee may do it, and it is warranted by law. 2 *Roll. Rep.* 177. 1 *Mod.* 104.

If one covenant, &c. to make ſuch further aſſurances, as the counſel of the covenantee, &c. ſhall adviſe, and the covenantee, &c. informs the covenantor, &c. that his counſel has adviſed after ſuch a manner, the covenantor muſt make ſuch aſſurance; but if it had been barely *as counſel ſhould adviſe*, it would be otherwiſe; for in ſuch caſe the counſel is to draw it, and the covenantee, &c. muſt bring ſuch aſſurance ready ingroſſed and tender it to the covenantor to ſeal. *Moor* 596. 5 *Rep.* 19. *Cro. Eliz.* 298. 2 *Lev.* 25. 1 *Mod.* 104.

An action of debt was brought upon articles of agreement, wherein the plaintiff covenanted to execute a good conveyance of certain lands to the uſe of the defendant, at or before the 17th of November, and the defendant in conſequence thereof agreed to pay the plaintiff 503*l.* &c. at ſuch a place, at the time of the execution of ſuch conveyance, &c. for which the action was now brought; and upon a demurrer to this declaration it was objected, that the plaintiff ought to execute the conveyance before the defendant is obliged to pay the money; becauſe where no certain day is appointed for the payment, it muſt be reduced to a certainty by the act of the plaintiff, which in this caſe was by executing the conveyance; but the law had been the ſame if a certain day had been appointed for the payment of the money; becauſe the payment muſt neceſſarily relate to the execution of the deed, and not to the very day in which it was appointed to be executed, and ſo it was adjudged. 1 *Lutw.* 565.

If no place be mentioned for payment of money in a condition, the obligor, if the obligee is in England, muſt at his peril find him out; but where a place is appointed he need ſeek no further. 1 *Inſt.* 210. *Lit.* 340.

It is a general rule, that whatever becomes impoſſible to be done by the act of God cannot injure any one.

Act of Bankruptcy. Acts which may render a man a bankrupt, muſt be ſuch as are done with intention to injure thoſe to whom he is lawfully indebted: and are, 1. A departure from the realm, 13 *Eliz. c.* 7. 1 *Jac. c.* 15. *ſ.* 2. with intent to defraud his creditors; for by this act he eludes the force, by withdrawing himſelf from the juriſdiction of the law: and it is held, that if a man departs the realm to merchandize, and becomes indebted, and to avoid arreſts defers his return, this does tantamount to a departing of the realm. *Stone* 123. *R. S. L.* 186.

2. An abſenting of himſelf from his houſe, with intent to ſecrete himſelf and avoid his creditors. 13 *Eliz. c.* 7. But if a perſon abſents himſelf, and at other times appears publickly, as upon the open exchange, this ſeems to be a purging of his former departure. *Good.* 21. And it has been held that if a perſon having no houſe does not appear, and cannot be found as formerly, this is an abſenting himſelf within the ſtatute. *Billing*, 95. *Good.* 21.

3. A keeping in his own houſe. 13 *Eliz. c.* 7. For if a man conceals himſelf in his houſe but a day, or an hour, to delay or defraud his creditors, it makes him a bankrupt. *Palm.* 325. If a man commits a plain and evident act of bankruptcy by ſecretion, and afterwards appears abroad, this will not purge the former act; but if the act was doubtful it will, becauſe in this caſe his appearing abroad explains his intention, that it was not to defraud or delay his creditors. *Salk.* 110. *Lev.* 13, 14, 17. 2 *Show.* 215, 512.

4. A taking ſanctuary, as flying to a place where the law cannot be ſo readily executed upon him, and to delay the payment of his debts, as to the verge of the court, &c. *Stone* 124. *Billing.* 93. *Dav.* 90, 91.

5. A procuring or ſuffering himſelf willingly to be arreſted for any debt, or other thing, not grown or due; for money delivered, wares ſold, or any other juſt or lawful cauſe, or good conſideration or purpoſes, or procures or ſuffers himſelf voluntarily to be outlawed or impriſoned to defraud his creditors. 1 *Jac.* 1. *c.* 15. And where a party procures himſelf to be arreſted upon a ſham debt, this is immediately an act of bankruptcy. 7 *Vin. Abr.* 62. *Gilb.* 23.

6. Procuring his money, goods, chattels and effects to be attached or ſequeſtred by any legal proceſs; for this is a plain endeavour to deprive his creditors of their ſecurity

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1 *Ja.* 1. *c.* 15. *ſ.* 2. But the confeſſing a judgment for a ſum that is juſtly due is not an act of bankruptcy.

7. Making a fraudulent conveyance to a friend, or ſecret truſtee, of his lands, tenements, goods or chattels, to the intent, or by the means of which his creditors ſhall, and may be defeated or delayed in the recovery of their debts. 1 *Jac.* 1. *c.* 15. *ſ.* 2. And if a man clandeſtinely carries or conveys away his caſh, bank bills, goods or effects, or his ſhop-books, or books of account, or makes a fraudulent bill of ſale of his goods, with an intent to deceive his creditors of the benefit and property of ſuch goods, and to conceal his eſtate and effects, and his accounts and dealings from them; this is a fraudulent conveyance of his goods and chattels, and is an act of bankruptcy. *Dav.* 102. Sir *John Holt* held, that a man's removing his goods privately, to prevent their being ſeized in execution was no act of bankruptcy: for the ſtatutes mention only fraudulent gifts to third perſons, and procuring them to be ſeized by ſham proceſs in order to defraud creditors. *Ld. Raym.* 725.

8. Obtaining any privilege or protection other than that of Parliament; for this is an endeavour to elude the juſtice of the law. 21 *Jac.* 1. *c.* 19. *ſ.* 2.

9. Preferring to any court any petition or bill againſt any of his creditors, endeavouring thereby to compel them to take leſs than their juſt debts; or to procure time, or longer days of payment than was originally contracted for. 21 *Jac.* 1. *c.* 19. *ſ.* 2.

10. Upon being arreſted for debt, lying in priſon two months after ſuch arreſt, upon that, or any other arreſt or detention for debt, without finding bail. 21 *Jac.* 1. *c.* 19. *ſ.* 2. For this muſt ariſe either from his knavery or deficiency in credit: in either of which caſes it is high time for the creditors to demand a diſtribution of his effects. The lying in priſon two *lunar* months makes a man a bankrupt from the firſt arreſt.

11. Eſcaping from priſon when being under an arreſt for 100 l. or upwards, is an act of bankruptcy upon the ſame principle as the laſt.

12. Paying, ſatisfying, or ſecuring the petitioning creditor his debt. 5 *Geo.* 2. *c.* 30. *ſ.* 24. This act of bankruptcy depends upon a private agreement between a bankrupt and his creditor, for the taking out a commiſſion, in conſideration of his being paid his whole debt, or more than

than the reſt of his creditors; and in this caſe, by the ſame ſtatute, a new commiſſion may be awarded, and ſuch creditor ſhall loſe his whole debt.

13. Neglecting to make ſatisfaction for any juſt debt to the amount of 100l. within two months after ſervice of legal proceſs, for ſuch debt, upon any trader having priviledge of parliament. 4 *Geo.* 3. *c.* 33.

It has been expreſsly determined, that a banker's ſtopping or refuſing payment is no act of bankruptcy; for it is not within the deſcription of any of the ſtatutes, and there may be good reaſon for his ſo doing, as ſuſpicion of forgery, &c. and if, in conſequence of ſuch refuſal he is arreſted, and puts in bail, ſtill it is no act of bankruptcy: but if he goes to priſon, and lies there two months, then, and not before, is he become a bankrupt. 7 *Mod.* 139.

ACTIONS. The ground-work or foundation upon which the ſtately edifice of all legal proceedings is built, and the fountain from which future ſucceſs in thoſe proceedings is moſt likely to flow, is a proper acquaintance with the diſtinctions the law has made as to things which are and are not actionable, and with the proper actions adapted to every injury. And in theſe diſtinctions, as to the law of England, the harmony and variety are equally conſpicuous: ſo much do equity and conſiſtency bear the conſtant ſway, that upon a diligent reſearch into the cauſes of thoſe diſtinctions we are forcibly conſtrained to acknowledge that they are the reſult of ſound and impartial experience and judgment.

An action is a method given by the law for the recovery of a right with-held, or for ſatisfaction for a wrong done, by one man to another; or, according to the definition of the great Lord Coke, it is *a legal demand of a man's right.* 1 *Inſt.* 285. Bracton defines it, *actio nihil aliud eſt quam jus proſequendi in judicio quod alicui debetur*, i. e. an action is nothing elſe than the right of proſecuting in judgment what is due to any one. See ACCOUNT, CASE, DEBT, TRESPASS, TROVER, &c.

ADMEASUREMENT. See ASSIGNMENT of DOWER.

ADMINISTRATORS. An adminiſtrator is one who by virtue of letters of adminiſtration granted by the ordinary, has the goods and effects of a perſon deceaſed committed to his care and adminiſtration.

The rules for granting adminiſtration are as follow: 1. To the huſband of the effects of the wife, and of the huſband's to the widow, or next of kin. 2. To the children, and

and if none to the parents of the deceaſed. 3. Then follow brothers or ſiſters, grandfathers or grandmothers, uncles or aunts, nephews or nieces, and laſtly couſins. 4. The brother of the half blood is preferred to the uncle of the whole blood; and the ordinary may grant adminiſtration to the ſiſter of the half, or the brother of the whole blood, at his own diſcretion. 5. Where none of the kindred will take out adminiſtration a creditor may. 6. If the executor refuſes, or dies inteſtate, the adminiſtration may be granted to the reſiduary legatee, in excluſion of the next of kin. And *laſtly*, in defect of all theſe, adminiſtration may be granted to ſuch diſcreet perſon as he approves of. —Neither the executor of the deceaſed's adminiſtrator, nor the adminiſtrator of the deceaſed's executor, is the repreſentative of the deceaſed, but the executor of his executor is; for in the two firſt caſes there is evidently no regular transfer of confidence, but in the laſt there is: and therefore, whenever a perſon dies leaving an executor who dies inteſtate, a new adminiſtration muſt be granted of the goods of the deceaſed left unadminiſtred by his executor. And if an adminiſtrator dies, the executor of the adminiſtrator cannot act under the letters of adminiſtration granted to his teſtator, but a new adminiſtration muſt be committed. 2 *Black. Com. p.* 506.

But letters of adminiſtration are frequently granted which are different from theſe; namely, where the deceaſed has made a will without appointing an executor, or where the executor refuſes to act, or dies inteſtate, or where he is legally incapacitated; and ſuch adminiſtrations are with the will of the deceaſed annexed; in which office he differs very little from an executor.

There alſo may be an adminiſtrator to an infant *durante minori ætate*, i. e. during his minority; which is when the infant is made executor; and ſuch adminiſtrator cannot ſell any goods except of neceſſity for payment of debts, or where the goods are periſhable; for his office is for the good of the infant, and it ceaſes when the infant arrives at the age of 17. But where the infant is intitled to adminiſtration, the adminiſtrator, *durante*, &c. continues, 'till the infant is 21. 5 *Rep.* 29. 6 *Rep.* 27. And it is in the diſcretion of the ordinary to appoint whom he will ſuch an adminiſtrator, without being obliged to grant it to the next of kin. 3 *Will. Rep.* 81, 166. *Ld. Raym.* 262, 338.

An

An adminiſtrator can do nothing 'till letters of adminiſtration are iſſued, except acts of neceſſity or humanity.

If adminiſtration is granted to an obligor, this does not extinguiſh the debt, but it ſhall be aſſets in his hands. 8 *Rep.* 136.

Where there is a reſiduary legatee, adminiſtration to the next of kin is revocable, and grantable to the legatee, in caſe the executor dies inteſtate. 2 *Lev.* 56. 1 *Vent.* 217.

Where adminiſtration is granted illegally it is repealable by the delegates. 1 *Lev.* 157, 186. 1 *Lill.* 38.

If there are many adminiſtrators one cannot ſell goods releaſe debts, &c. without the other, for they muſt all join. *Noy Max.* 106.

If an adminiſtration is granted, and afterwards a will is produced and proved, the adminiſtration ſhall be revoked, and all acts done by the adminiſtrator are void. 2 *Rol. Abr.* 907. See Executors.

Admission. An action on the caſe will not lie againſt the biſhop if he refuſes to admit a clerk to be qualified according to the canons, (as for any crime or impediment) but the proper remedy is by writ, *quare non admiſit*, or *admittendum clericum*, brought in that county where the reſidence was. 7 *Rep.* 3.

Admittance. This is a neceſſary ceremony for the perfection of copyhold aſſurances; and in admittances the Lord is conſidered as an inſtrument: for though he may deſtroy the tenure, and grant an abſolute fee-ſimple, a freehold, or chattle intereſt therein; yet, if he will diſpoſe of them as copyhold, he can neither add to nor diminiſh the ancient rent, nor make the leaſt incroachment upon the ancient cuſtom, and can neither in tenure or eſtate introduce any alteration whatſoever. *Co. Cop. f.* 14.

Adultery. If but one of the perſons is married it is adultery. The proper remedy in caſes of adultery is by application to the Spiritual Court, and recourſe alſo may be had to the temporal courts of Common Law for redreſs against the adulterer on account of the private injury, in which very heavy damages are frequently given.

Adulterating Wine. See Wine.

Affray. Is the fighting of two or more perſons in ſome public place, to the terror of his Majeſty's ſubjects. 3 *Inſt.* 158. For if the fighting be in private it is no affray, but an aſſault. 1 *Hawk. P. C.* 134. The puniſhment of com-

affray

affrays is by fine and impriſonment; the meaſure of which muſt be regulated by the circumſtances of the caſe. 4 *Black. Com.* 145. And they are inquirable in the leet as common nuiſances. 3 *Inſt* 158.

Conſtables, &c. may break open doors to ſuppreſs an affray, or apprehend the affrayers; and may either carry them before a juſtice, or impriſon them by his own authority 'till the heat is over. 1 *Hawk. P. C.* 137. See FALSE IMPRISONMENT, and HOUSE.

AGE. See ADMINISTRATOR and INFANT.

AGREEMENT. An agreement is defined, *aggregatio mentium in re aliqua facta vel faciendâ*, the joining of two or more minds in a thing done, or to be done. *Plowd.* 17. *a.*

Care ſhould be taken how agreements are made with idiots, infants, or wives, for they are incapable of contracting.

In many caſes the party injured by a breach of an agreement may have a remedy either by action at Common Law, or by recourſe to a Court of Equity; but here a general rule muſt be obſerved, that wherever the matter in queſtion is merely in damages, there the remedy is at law, becauſe the damages cannot be aſcertained by the conſcience of the Chancellor, but muſt be ſettled by a jury. 1 *New Abr.* 69. *Abr. Eq.* 16. But where the agreement is to do ſomething in *ſpecie*, as to convey lands, execute a deed, &c. there it is proper to apply to a Court of Equity for a ſpecific performance of ſuch agreement, to which the party is intitled if the agreement be good and ſufficiently proved, when by an action at law he could only recover damages. 1 *Chanc. Ca.* 42. And in ſome caſes the Court of Chancery will, beſides the remedy there, direct an iſſue for the *quantum* of the damages, that is an action in a court of law to determine how much damage the party has ſuſtained. 1 *Chan. Rep.* 158. *Abr. Eq.* 17.

As to voluntary agreements, it is certain that as men have a right to their acquiſitions, ſo may they diſpoſe of them at their pleaſure, and without valuable conſideration; but if a man promiſes to convey lands, or to give goods, without a valuable conſideration, or without delivering poſſeſſion of them, this being *nudum pactum unde non oritur actio*, does not alter the property in them, nor has the party any remedy in law or equity. 6 *Co.* 18. *b.* Yet if it be done by deed duly executed, under ſeal, this is good in law,

law, though there be no consideration, or no delivery of poſſeſſion; for a man cannot deny his own deed, nor affirm any thing contrary to the manifeſt ſolemnity of contracting. *Yelv.* 196. *Cro. Jac.* 270. 1 *Brownl.* 111. 6 *Co.* 18. *b.*

Voluntary conveyances are good againſt the parties, and cannot be revoked; for a Court of Equity will not interpoſe in behalf of one volunteer againſt another: unleſs they affect creditors, purchaſers for a valuable conſideration, or younger children, for then the court will ſet them aſide. 1 *Chanc. Rep.* 173. 1 *Vern.* 100, 464.

By ſtatute, verbal promiſes in the following caſes ſhall not be ſufficient to ground an action upon, but muſt be put in writing, and ſigned by the party to be charged therewith. 1. Where an executor or adminiſtrator promiſes to anſwer damages out of his own eſtate. 2. Where a man undertakes to anſwer for the debt, default, or miſcarriage of another. 3. Where any agreement is made upon conſideration of marriage. 4. Where any contract or ſale is made of lands, tenements, or hereditaments, or any intereſt therein. 5. And laſtly, Where there is any agreement that is not to be performed within a year from the making thereof. 29 *Car.* 2. *c.* 3. *ſ.* 1. See ASSUMPSIT and SALE.

ALIEN. An alien is one born out of the obedience and dominions of the king; and while he continues unnaturalized he cannot purchaſe or inherit lands in England. *Vaugh.* 227, 291. Nor can he be inherited. 1 *Sid.* 193, 198. And if a woman alien, whether friend or enemy, marries a ſubject, ſhe ſhall not be endowed. 7 *Co.* 25. *Co. Lit.* 31. *a.* Nor ſhall aliens be tenants by the curteſy.

An alien friend may have perſonal actions, but not real; an alien enemy neither real, perſonal, nor mixed. *Co. Lit.* 129. *b.* 1 *And.* 25. *Dyer* 2. *b.*

If an alien purchaſe lands the king ſhall have them upon office found; but if an alien purchaſe and dies, then the freehold is in the king without office found; becauſe no man can take it as heir to the alien, therefore the freehold is caſt upon the king. *Co. Lit.* 2. 1 *Leon. pl.* 61.

Aliens may become ſubjects by *denization* and by *naturalization*; the former is by the king's letters patent, the latter by act of parliament. A denizen may purchaſe and tranſmit lands by deſcent to thoſe born after his denization, but he cannot inherit to another relation. One naturalized

turalized in all things inherits as a natural-born ſubject. 1 *Inſt.* 8. *a.* 129. *a. Palm.* 13. *Co. Lit.* 8. *Styles Rep.* 139. *Cro. Jac.* 539.

A deviſe of land to an alien is void. And if a man be bound to an alien enemy, the bond is void to him, but the king ſhall have it. *Danv.* 322. 1 *Lev.* 59. See ALIENATION.

ALIENATION. Is the transferring the property of any thing from one to another; and this one term comprizes every method of reſigning eſtates by one man, and accepting them by another.

If a man has only the right either of poſſeſſion or property he cannot convey it to another; yet reverſions and veſted remainders may be granted, becauſe the poſſeſſion of the particular tenant is the poſſeſſion of him in reverſion or remainder; but contingencies, and mere poſſibilities, though they may be releaſed, or deviſed by will, or may paſs to the heir or executor, yet cannot be aſſigned to a ſtranger, unleſs coupled with ſome preſent intereſt. 2 *Black. Com.* 290.

Perſons attainted of treaſon, felony, and præmunire, cannot purchaſe, and purchaſes by ideots, infants, and perſons under dureſs, are voidable, but not actually void. *Idem.* 291.

Wives may purchaſe an eſtate, and the purchaſe is good 'till the huſband by ſome act avoids it; and the wife herſelf after the death of her huſband may avoid it; as may her heirs if ſhe die before her huſband, if in her widowhood ſhe does not confirm it. *Co. Lit* 3. But the conveyance, or other contract of a wife (except by ſome matter of record) is abſolutely void, and not merely voidable, and therefore cannot be made good by any ſubſequent agreement. *Perkins. ſ.* 154. 1 *Sid.* 120.

An alien born may purchaſe any thing; but after purchaſe can hold nothing, except a leaſe for years of a houſe for convenience of merchandize if he be an alien friend, all other purchaſes (when found by an inqueſt of office) being immediately forfeited to the king. *Co. Lit.* 2.

Papiſts above the age of 18 are by the *11th and 12th W.* 3. *c.* 4. diſabled to purchaſe lands, rents, or hereditaments; and all eſtates made to their uſe, or in truſt for them, are void: yet the next Proteſtant heir of a Papiſt under 18 ſhall have the profits during his life, unleſs he renounces his errors within the time limited by the law. 1 *P. Wms.* 354.

ALIMONY

ALIMONY. Is a *maintenance* which is allowed a married woman on ſeparation from her huſband; but in caſes of elopement, and living with an adulterer, the law allows her no alimony. *Cowel. tit. Alimony.*

In caſe of a divorce *a menſa & thoro*, i. e. from bed and board, a wife may ſue for alimony out of the huſband's eſtate, either in Chancery or the Spiritual Court, and it will be allowed according to the rank and quality of the parties. 1 *Inſt.* 235.

If a man refuſes payment there is (beſides the ordinary proceſs of excommunication) a writ at Common Law *de eſtoveriis habendi*, in order to recover it. 2 *Mod.* 314. See BARON and FEME.

ALLOWANCE to Bankrupts. If his effects will not pay 10s. in the pound, he is left to the diſcretion of the Commiſſioners to have a ſum not exceeding 3 per cent. allowed him; if 10s. 5 per cent.; if 12s. 6d. 7 and a half per cent.; and if 15s. then he ſhall have 10 per cent. provided ſuch allowance does not in the firſt caſe exceed 200l. in the 2d 250l. and in the 3d 300l. 2 *Black. Com.* 483. But if he has not obtained a certificate, or does not diſcover a fictitious debt, or has given above 100l. for a marriage portion, not having then ſufficient left to pay his debts, or if he had at any one time loſt 5l. or in the whole 100l. within a twelvemonth before he became a bankrupt by gaming, he loſes theſe advantages. *Idem.* 484.

ALTERATION of Deeds. Deeds may be avoided by raſure, interlining, or other alteration in any material part, unleſs a memorandum be made thereof at the time of the execution and atteſtation. 11 *Rep.* 23.

AMERCEMENTS. Tenants not doing ſuit of court, making incroachments, not obeying orders, &c. may be amerced. *Terms de ley.* 40.

If an amerciament be not paid, an action lies. 5 *Rep.* 64. *Hob.* 279.

ANNUITY. An annuity is a yearly ſum payable by one to another; and it differs from a rent-charge in that *this* is chargeable upon, and iſſues out of lands, while an annuity is chargeable upon the perſon of the grantor. *Co. Lit.* 144. And whenever an annual ſum is granted, without mentioning out of what lands, &c. it ſhall iſſue; it is an annuity and not a rent-charge, and conſequently no land ſhall be charged with it.

If a man by deed grants an annual rent in fee for life, or years, out of certain lands, with clauſe of diſtreſs, the grantee may at his election either diſtrain for rent, or have a writ of annuity and thereby charge his perſon. 6 *Co.* 58. *b.*

An action of debt does not lie for the arrearages of an annuity, if the grantee be ſeized of it in fee-tail, or for life. *Co. Lit.* 162. 4 *Co.* 49. *a.* But it has been held that it would if granted for years. *Cro. Eliz.* 268.

The remedies for recovery of annuities, or rent-charges, are either the writ of annuity or diſtreſs, and it will be well to conſider which is the moſt eligible method, and what ſhall determine the grantee's election, ſeeing that when he has choſen the one he cannot charge the other. And here let it be obſerved, that if A. grants a rent-charge to B. and his heirs, if the rent be in arrear the grantee and his heirs may diſtrain for it; but if, inſtead of diſtraining, the grantee brings a writ of annuity, it is no longer to be conſidered as a rent iſſuing out of the land, becauſe the writ of annuity has intirely turned the charge upon the perſon of the grantor; and under that denomination it muſt determine with the life of the grantor, becauſe his heirs are not chargeable. 1 *Roll. Abr.* 226. *Poph.* 87. *Hob.* 58. *Dyer* 344. *Co. Lit.* 144. But if A. had granted for him and his heirs, they being comprehended in the contract, would be liable ſo far as they have aſſets by deſcent from the grantor. *Idem.*

But in ſome reſpects the writ of annuity is the better remedy, as if the grantor of a rent-charge for himſelf and his heirs to A. *and his heirs*, be a term or *for years*; for in this caſe if the grantee diſtrains, and thereby throws the charge intirely off the perſon upon the land, upon the expiration of the grantor's term the rent is gone; but if he had brought a writ of annuity, the charge upon the perſon would have continued as long as the heirs of the grantor had any aſſets, becauſe the grant was for him and his heirs. *Poph.* 87.

But the mere ſuing forth a writ of annuity is no determination of his election, for it muſt be by ſome ſolemn act in a Court of Record, that it may appear to be the act of the grantor himſelf. *Lit. ſect.* 219. 1 *Roll. Abr.* 223. *Co. Lit.* 145.

But where the grantor (who has not granted for himſelf and his heirs) dies, though the grantee brings a writ of annuity againſt the heir and proceeds to judgment, this does not

not foreclose him of his diſtreſs, for he has no election having but one remedy, which is by diſtreſs. *Dyer* 344. *Heb.* 58.

APPRENTICES. Perſons inticing away apprentices cannot be indicted, but the proper remedy is by an action on the case. 6 *Mod.* 182.

ARBITRATION. Is where the parties injuring and injured preferring a private determination to a public judgment ſubmit all matters in diſpute concerning any perſonal chattel or perſonal wrong, to one or more perſons, for their final deciſion and judgment; and the common practice is if the arbitrators being more than one cannot agree, to call in a third perſon, who is called an *umpire*, and to whoſe ſole judgment the matter is ultimately referred.

This deciſion is called an award, and by this the matter is as effectually ſettled as if it had been by the ſolemn judgment of a Court of Law. *Brownl.* 55. 1 *Freem.* 410. And by the *9th and 10th W.* 3. *c.* 15. ſubmiſſion to award by agreement may be made a rule of court, and after ſuch rule made the parties diſobeying the award are liable to be puniſhed as for a contempt of the court, unleſs ſuch award ſhall be ſet aſide for corruption or other miſbehaviour in the arbitrators or umpire, proved on oath to the court, within one term after the award is made.

Theſe ſubmiſſions are uſually made by the parties entering into mutual bonds, with a penalty upon a breach of the award.

Things perſonal, and perſonal actions, as account, treſpaſs, conſpiracy, maintenance, &c. may be determined by an award; but where the right of freehold is in debate the property cannot be ſo transferred. 22 *H.* 6. 39. 9 *E.* 78. 1 *Roll. Abr.* 242, 244.

An annuity is not determinable by award. 9 *H.* 6. 14 *H.* 4. 19. 3 *H.* 4. 6. Partition cannot be made by award. 1 *Roll. Abr.* 266. 1 *Roll. Abr.* 242. And it has been doubted, whether leaſes for years being chattels real could be transferred by award? 1 *Roll. Abr.* 242, 9 *E.* 78. 6 *Co.* 41. 1 *Leon.* 104. Therefore it is the ſafeſt way in theſe caſes for the parties mutually to bind themſelves to abide by the award, for then if the arbitrators award that one ſhall aſſign, transfer, &c. the leaſe to the other, and the party refuſes he forfeits his obligation.

Criminal cauſes are not arbitrable, becauſe they ought to be puniſhed for the public good. *Weſt. Symb. p.* 2. *ſ.*

And in this caſe if the ſubmiſſion be by bond, yet the obligation is void and the parties may be puniſhed for entering into ſuch bonds. 2 *Ventr.* 109.

Alſo matrimonial cauſes are not arbitrable. *Weſt. Symb. p.* 2. *ſ.* 33.

An award that a ſtranger ſhall do an act is void. 1 *Leon.* 316. 3 *Leon.* 62. *Hard.* 46.

Awards ſhould be made *according to the ſubmiſſion* for if it be made of any other thing than what is contained in the ſubmiſſion, it is void. *Plowd.* 396. *Dyer* 242. Upon a ſubmiſſion of all injuries, an award of all debts, duties and treſpaſſes is good: for whatever is againſt law is an injury. 3 *Bulſt.* 312, 313.

Awards ought to be *certain:* therefore an award that one ſhall pay another ſo much as is due in conſcience, is void for uncertainty. *Stile* 28. But if the award be to pay the charges of ſuch a ſuit, it is good: becauſe it is the arbitrators intent that it ſhould be reduced to a certainty by the attorney's bill. *Cro. Car.* 383. 2 *Ventr.* 342. *ſed Q?*

Awards ſhould be *mutual* and *ſatisfactory:* for if A. and B. ſubmit all actions had by A. againſt B. and by B. againſt A. and the award is, that A. ſhall go quit of all actions had by B againſt him, this is naught: becauſe nothing is ſaid of the other actions. 7 *H.* 6. 40. 1 *Roll. Abr.* 253. And an award that one ſhall go to Rome or Paul's, is not good, becauſe to nobody's advantage. 1 *Roll. Abr.* 252.

Awards muſt be of things *lawful* and *poſſible:* Therefore awards that one ſhall turn the river Thames, kill, ſteal, forge a deed, &c. are void. *Co. Lit.* 206.

Awards muſt be *final:* therefore an award that one of the parties ſhall be nonſuit, or that each party ſhall diſcontinue their actions is not final, becauſe they may begin again. 9 *H.* 6. 36. 1 *Roll. Abr.* 540. 5. *H.* 7. 22.

A ſubmiſſion of a matter to *reference* is no ſtay of ſuit in that matter, if it is not ſo particularly agreed. 7 *Mod.* 38.

ARREST. An arreſt in civil cauſes muſt be by corporal ſeizing or touching the defendant's body. Where a perſon authorized to arreſt another who is ſheltered in a houſe, is denied quietly to enter it; there are certain caſes in which he may juſtify breaking open the doors; for which ſee title HOUSE.

In a civil ſuit, if an officer break open an outer-door he is a treſpaſſer; but if he finds the outer door open, or if the door be opened to him from within, and he entreth, he may break open inner doors if he finds it neceſſary. *Foſt.* 319. See BAIL, FALSE IMPRISONMENT and HOUSE.

ARREST OF JUDGMENT. In *criminal* proſecutions whenever the party has received his trial, and appears in perſon to receive judgment, he may at this period, as well as at his arraignment, offer any exceptions to the indictment, in arreſt or ſtay of judgment: as for want of ſufficient certainty in ſetting forth either the *perſon*, the *time*, the *place*, or the *offence*. And, if the objections be good and valid, the whole proceedings are ſet aſide; but the party may be indicted again. 4. *Black. Com.* 368.

In *civil* cauſes: where there is ſufficient reaſon, the party may within the firſt four days of the next term after the trial when it was in the vacation, and within four days of the trial if in term time, by application to the court, move in arreſt or ſtay of judgment; as, 1. If the declaration varies totally from the original writ; as where they are for different cauſes of actions. 2. Where the verdict materially differs from the pleadings and iſſue thereon; as if the declaration be that the defendant ſaid the plaintiff is a bankrupt, and the verdict finds ſpecially, that he ſaid, "he "will be a bankrupt." 3. If the caſe laid in the declaration is not ſufficient in point of law to found an action upon, and it is a general rule, "that whatever is alledged "in arreſt of judgment muſt be ſuch matter as would "upon demurrer have been ſufficient to overturn the ac- "tion or plea;" but on the other hand, it is not every thing that may be demurred to in the courſe of the pleadings that will be a ſufficient cauſe of arreſt of judgment for want of form only, where there is no want of ſubſtance, is aided by a verdict. But if the thing omitted be eſſential to the action or defence, as if the plaintiff do not merely ſtate his title in a *defective manner*, but ſet forth a title *totally defective in itſelf*, or if to an action of debt the defendant pleads *not guilty* inſtead of, *he is not indebted*, theſe cannot be cured by a verdict. *Salk.* 365. 6 *Eliz.* 778. 3. *Black. Com.* 393.

ARSON, from the Latin *ardendo*. Is the malicious and wilful burning of the *houſe* or *outhouſes* of another man by night.

or by day, and it is a felony. 3. *Inſt.* 67. 4. *Co.* 20. *Dal ca.* 105. *Hales P. C.* 86.

The offence of Arſon (ſtrictly ſo called) may be committed by wilfully ſetting fire to one's own houſe, if the houſe of one's neighbour be burnt thereby; but it is no felony if the miſchief ends with one's own houſe, though there was an intent or even an attempt to burn another's. For by the Common Law no intention to commit a felony amounts to a felony; though it is made ſo in ſome caſes by particular ſtatutes. However ſuch wilful firing one's own houſe, if in a town, is conſidered as a high miſdemeanour, and is puniſhable by a ſevere fine, impriſonment, pillory and perpetual ſureties for good behaviour. *Cro. Car.* 377. 1 *Inſt.* 351. 1 *Hal. P. C.* 568. 1 *Hawk. P. C.* 106.

SCENDANTS. See DESCENT.

SSAULT. An aſſault is an *attempt* or *offer* with force and violence maliciouſly to injure another by doing him a corporal hurt: and whatever action a man does which ſhews a malicious intention to do ſuch hurt, is an aſſault in law; as if one, in an angry manner, aim a blow or ſtrike at another whether with or without a weapon, an action of treſpaſs *vi et armis* will lie; or, if one being within gun ſhot of another purpoſely and ſeriouſly preſents a gun at him; or, ſtanding within reach, points a pitchfork at him, or caſt ſtones at him being within reach, or draw a ſword and wave it in a menacing manner. But it will not lie if the party be at a great diſtance, ſo that he could not poſſibly reach him; or if it be done by mere accident or jocoſely. 1 *Roll. Abr.* 545. *Pulton* 4. *a.* 6 *Mod* 173. 1 *Vent.* 256. 1 *Hawk. P. C. p.* 133. *Bro. Treſ.* 236. 336. 7. *E.* 4. 26. *Finc.* 29. 40. 22 *Aſſ. Pl.* 60.

The intention of the party muſt co-operate with the act to make an aſſault; therefore, if one ſtrike another upon the hand or arm, or breaſt, in diſcourſe, it is no aſſault, there being no intention to aſſault: and if one lay his hand on his ſword and ſay, *if it were not aſſize time I would not take ſuch language from you*, it is no aſſault, for that it is plain he did not mean to aſſault him, and his bare actions are not to be taken as ſigns of his mind when he hath in words expreſſed himſelf to the contrary. 2. *Keb.* 545. 1 *Ind.* 3. 10 *Mod.* 187. *Gilb. L. of Evid. p.* 256.

Notwithſtanding the many ancient opinions to the contrary, it ſeems agreed at this day that no words whatſoever,

ſoever, be they never ſo provoking can amount to an aſſault. 1 *Hawk. P. C.* 134.

Every battery includes an aſſault, therefore if the defendant be found guilty of the battery it is ſufficient. *Ibid. & Salk.* 384.

For this offence an action of treſpaſs and aſſault is the proper remedy, and though no actual ſuffering is proved, yet the party injured ſhall recover damages as a compenſation for the injury. 3 *Black. Com. p.* 120.

Aſſaults and batteries conſidered as private wrongs or civil injuries, for which the party injured intends to obtain ſatisfaction, are as I have already obſerved, the proper ſubjects of an action of treſpaſs: but theſe crimes when conſidered in a public light as contempts to government and breaches of the peace, are indictable and puniſhable with fine and impriſonment. And in caſe of violent aſſaults, with ſome atrocious intent, as to murder, impriſon, &c. &c. beſides a heavy fine and impriſonment, it is uſual to award judgment of the pillory: and in ſuch caſes an indictment is the moſt uſual and moſt ſafe method of proceeding, on account of the difficulty which would attend the proof by a third perſon in a civil ſuit, the party upon an indictment being allowed to give evidence for himſelf. *Hawk. P. C.* 63.

A private aſſault is not inquirable in the Leet. See AFFRAYS.

ASSETS, from the French *aſſez*, enough. *Finch Law*, 119.

Among the things left by a teſtator or inteſtate, ſome are aſſets; that is, chargeable to pay debts and legacies, others are not. And theſe are either real or perſonal. Of real lands which come to the heir by deſcent are aſſets, but lands which come to him by purchaſe are not; for if the anceſtor by any deed bindeth himſelf and his heirs and dieth, this deed, &c. ſhall be binding *upon the heir* ſo far as he has any eſtate veſted in him, (or in another in truſt for him) by deſcent, whether the poſſeſſion continues in him or he alienes it, before the action be brought, and he is anſwerable no further. 29. *Car.* 2. *c.* 3. 1 *P. Will.* 7. 3 & 4. *W. & M. c.* 14. *Terms de Ley* 56.

Whatever perſonalty he leaves behind him, which is of a ſaleable nature, and may be converted into ready money, is called *aſſets*, or that which is ſufficient in the hands of the executor or adminiſtrator, to charge him with the diſpo-

tion of it to a creditor or legatee, as far as ſuch things will extend, and he may convert them into ready money for that purpoſe.

ASSIGNEES OF BANKRUPTS. Are perſons choſen by a major part (in value) of the creditors of the bankrupt, and none of whom ſo chuſing muſt be a debtor under 10l. to which aſſignees the bankrupt's eſtate is aſſigned, and in whom it is veſted with the ſame power as the bankrupt had for the benefit of his creditors. 12 *Mod.* 324. They may alſo be originally choſen by the commiſſioners, and approved or rejected by the creditors.

Aſſignees may ſue for the bankrupt's debts in their own name. *Cro. Jac.* 105. And notice of the aſſignment of the debt, is not neceſſary to be given to the debtor before the action be brought. *Lutw.* 456. In an action by the Aſſignees they muſt prove the Act of Bankruptcy. See ASSIGNMENT and BANKRUPT.

ASSIGNMENT. Is in its largeſt ſenſe a transfer or conveyance of the right of *any* eſtate, but in a more limited and common ſenſe it is applied to an eſtate for life or years, and houſes or things in action, i. e. things which may be recoverable by action, as notes, &c.

As to ſuch things which are or are not aſſignable in *law*, it is to be obſerved that at the *common law*, a poſſibility, *right* of entry, or thing in action, as notes, &c. or cauſe of ſuit, a title for a condition broken, cannot be granted or aſſigned over. *Co. Litt.* 214. 1 *Roll. Abr.* 376. *Skin.* 6, 26.

However, though a bond being a thing in action cannot be aſſigned over, ſo as to enable the aſſignee to ſue in his own name, yet it may be aſſigned by power of attorney to ſue and receive in the aſſignees name. 3 & 4 *Ann.* 9. And he has by the aſſignment ſuch a title to the paper and wax, that he may keep or cancel it. *Co. Litt.* 232. By the modern practice he may ſue for it in the name of the obligee, as his attorney; but Q. whether he can do it without an expreſs authority. *New. Abr.* 157.

And though at the common law a bond cannot be aſſigned, yet *in equity* it is aſſignable for a valuable conſideration *paid*, and the aſſignee alone becomes entitled to the money, ſo that if the obligor after notice of the aſſignment pays the money to the obligee, he will be compelled to pay it again. 2 *Vern.* 540, 595. 3 *Chan. Rep.* 90. 1 *Chan. Ca.* 232. *Ld. Raym.* 683.

If one deviſe a *term of years* to A. for life, with the remainder after his death to B. in this caſe B. having a mere poſſibility cannot aſſign his intereſt during the life of A. for A. may outlive the number of years. 10 *Co.* 47. 1 *Sid.* 188. 1 *Chanc. Ca.* 8. 2 *Vern.* 563.

A perſonal truſt which one man repoſes in another cannot be aſſigned over, however able ſuch aſſignee may be to execute it. 4 *Inſt.* 85. *Vaugh.* 180.

Several things are aſſignable by the ſtatute law, which ſeem not to be ſo in their own nature; as, promiſſory notes, and the aſſignee may ſue in his own name. 3 & 4 *Ann. c.* 9. Bail bonds by the ſheriff. 4 *Ann. c.* 16. *ſ.* 20. A judge's certificate for taking and proſecuting a felon to conviction. 10 & 11 *W.* 3. *c.* 23. *ſ.* 2. And a bankrupt's effects by the ſeveral ſtatutes of bankruptcy.

ASSIGNMENT OF DOWER. The particular lands to be held by the widow in dower muſt be aſſigned by the heir of the huſband, or his guardian. If neither of theſe endow the widow within 40 days after her huſband's death, or endow her unfairly, ſhe has her remedy at law, and the ſheriff is appointed to aſſign it. *Co. Lit.* 34, 35. Or if the heir (being under age) or his guardian, aſſign more than ſhe ought to have, it may afterwards be remedied by writ of *admeaſurement of Dower*. *F. N. B.* 148. *Finch L.* 314.

If the thing of which ſhe is to be endowed is capable of diviſion, her dower muſt be ſet out by metes and bounds; but if it cannot be divided, ſhe muſt be endowed ſpecially; as, of the third preſentation to a church, the third toll dish of a mill, the third part of the profits of an office, the third ſheaf of tithe, &c. *Co. Lit.* 32.

ASSUMPSIT. Latin *aſſumo*, to aſſume, or take upon one's ſelf, is a voluntary promiſe or undertaking, made by word of mouth to perform any thing, or to pay a ſum of money to another. And an aſſumpſit has in it the nature of a verbal covenant, and wants only the writing and ſealing to make it the very ſame. The remedies are, however, different between a written and verbal covenant upon a breach of non-performance; for an action of covenant is the proper remedy for the former, and an action upon the caſe for the latter; and in either of theſe actions the party recovers damages in proportion to the loſs he has ſuſtained by the violati-

violation of the contract. 4 *Co.* 92. *Moor* 667. See AGREEMENT.

All promiſes and contracts are to receive a favourable interpretation; and ſuch conſtruction is to be made, where any obſcurity appears, as will beſt anſwer the intent of the parties: otherwiſe a perſon, by obſcure wording of his contract, might find means to evade and elude the force of it. Hence it is a general rule, that all promiſes ſhall be taken moſt ſtrong againſt the promiſer, and are not to be rejected, if they can by any means be reduced to a certainty. 1 *New Abr.* 168. Therefore if A. in conſideration that B. will marry his daughter, aſſumes and promiſes to give to B. 20 *French* pieces; this is a good promiſe, for this, according to our uſual ſpeech, ſhall be intended *French* crowns. *Cro. Car.* 194. And if a man promiſes another, in conſideration that he will aſſign to him a certain term, to pay him 10l. this is a good *aſſumpſit*, though the time of *aſſignment* and *payment* be not appointed, for the 10l. ſhall be paid in a convenient time after the aſſignment, which alſo muſt be made in convenient time, and he ſhall not have time during life. 1 *Roll. Abr.* 14, 15.

There ought alſo to be a ſufficient *conſideration* to enforce a promiſe.

Therefore if a man promiſes to pay ſo much money at a day to come, to build a houſe, or church, without conſideration, this is a naked promiſe, and will not oblige. 1 *Roll. Abr.* 9, 10. *Dr. & Stud.* 211, 213, 215.

But if a carpenter promiſes to mend my houſe before a certain day, and he does not do it, by which my houſe falls, or if he undertakes to build an houſe and does it ill, an action on the caſe lies. 1 *Roll. Abr.* 9. *Kelw.* 78.

And if A. in conſideration that B. will make an eſtate at *will* to him, ſuch as council ſhall deviſe, promiſes, &c. this is no good conſideration, for B. may preſently after the eſtate is made, determine it. 1 *Roll. Abr.* 23. *Poph.* 183. See CONSIDERATION.

The conſideration muſt *not be executed* or *paſt*, but *muſt be continuing*.

A conſideration altogether executed and paſt is not good to maintain an *aſſumpſit*; but if the conſideration was moved and done in conſequence of a precedent requeſt it is good; therefore, if the ſervant of A. be arreſted and J. S. who knows A. bails him, and *afterwards* A. for his friend-

ſhip, promiſes to ſave him harmleſs, and J. S. comes to be charged; yet this is no conſideration to ground an aſſumpſit, upon, becauſe the bailing, which was the conſideration was paſt and executed before the promiſe was made. *Dyer* 272. 1 *Roll. Abr.* 11. 2 *Leon.* 225. *Owen* 144. *Yelv.* 41. 2 *Stra.* 933. 2 *Barnard K. B.* 55. But it had been otherwiſe if the maſter of A. had *before bailing* requeſted him to become bail for his ſervant, becauſe the promiſe in this caſe is not naked, but couples itſelf with the precedent requeſt, and the merits of the party procured by that requeſt. 2 *Leon.* 225. *Hob.* 106. *Cro. Car.* 409. *Dyer* 172. 1 *Roll. Abr.* 11.

But where A. promiſed, &c. in conſideration that B. had paid money for him, and obtained a releaſe of his debt, it was held a continuing conſideration, becauſe the benefit of it was continuing to the party. 2 *Keb.* 99.

And if a man requeſts another to labour for his pardon, &c. and after he has done his endeavour, if the other ſays, in conſideration that he has laboured for his pardon at his own charge, he promiſes to pay him ſo much, &c. this is a good conſideration. 1 *Roll. Abr.* 11. *Stile* 465. *Dyer* 355. *Mon.* 866. 1 *Brownl.* 8. *Hob.* 105. So if A. ſerves B. for a year, but has nothing for his ſervice, and afterwards at the end of the year B. for his good ſervices, aſſumes to pay him 10l. A. may have an action on the caſe upon this promiſe againſt B. for the conſideration is good. 1 *Leon.* 225. *Godb.* 32. *Cro. Eliz.* 42. But if a ſervant has wages given him, and after his ſervice ended, the maſter makes ſuch a promiſe an action will not lie, becauſe there is no precedent conſideration. 2 *Leon.* 225. *Hutt.* 84.

Promiſes are not valid if the conſideration be againſt law. Therefore if an officer, who by reaſon of his office, is obliged to execute writs, promiſes, in conſideration of money paid to him, to ſerve a certain proceſs, an *aſſumpſit* will not lie on this promiſe, for the receipt of the money was extortion, and the conſideration unlawful. 1 *Roll. Abr.* 16. 1 *Roll. Rep.* 313.

If A. in conſideration of ſome benefit, promiſes not to ſet up or follow the ſame trade with the plaintiff in ſuch a town, this is a good promiſe; but if the promiſe were, not to ſet up or follow the ſame trade in any part of the kingdom, it would be void. 1 *Roll. Abr.* 16, 17. 2 *Roll. Rep.*

Rep. 201. *Cro. Jac.* 326, 596. 2 *Bulſt.* 136. 1 *Jones* 13. *March* 77. 2 *Ld. Raym.* 1456. 2 *Stra.* 739. *Forteſc.* 297.

Actions of aſſumpſit are of two ſorts, expreſſed or implied. 1. *Expreſs*, as if a man promiſes to build and cover another houſe within the time limited, and fails to do it, or upon a promiſſory note, or note of hand, not under ſeal, which remains unpaid. 2. *Implied*, which are of ſix ſorts. 1. Aſſumpſits on a *quantum meruit*; as if I neglect to make him amends whom I have employed to tranſact my buſineſs; for the law implies that I undertook to pay him what he deſerved. 2. On a *quantum valebat*; as if I take up goods or wares of a tradeſman without an *expreſs* agreement for the price, the law implies a promiſe, and ſo ſupplies the defect, and will give the party as much as the goods are reaſonably worth. 3. Where one has received money belonging to another, without any valuable conſideration on the receiver's part; for the law conſtrues this to be received for the uſe of the owner only, and implies that the perſon ſo receiving undertook to pay it to the real owner: this lies for money paid by miſtake, or on a conſideration which happens to fail, or through impoſition, extortion, or oppreſſion, or where undue advantage is taken of the plaintiff's ſituation. 4. Where a perſon has laid out his own money for the uſe of another at his requeſt, the law implies a promiſe of repayment, and an action will lie upon this *aſſumpſit*. 5. Upon a ſtated account between two merchants, or other perſons, the law implies that he againſt whom the balance is found has engaged to pay it, though there be no actual promiſe. 6. The laſt claſs of implied contracts ariſes upon this ſuppoſition, that every one who undertakes an office, employment, truſt, or duty, contracts with thoſe who employ or intruſt him to perform it with integrity, diligence, and ſkill, and lies for neglects and defaults of ſo doing, &c. 3 *Black. Com. p.* 162, 163, 164. See CASE, BAILMENT, and SALE.

ATTACHMENT of CONTEMPT, is a writ which lies againſt thoſe who obſtruct, inſult, or reſiſt the powers of courts of juſtice, or the perſons of judges who preſide there, or do ſuch things as tend to leſſen or create diſregard to their authority; as, by diſobeying the rules and orders of the court, and the like. This proceſs is intended merely to bring the party into court, where he is either to ſtand committed, or to give bail, in order to anſwer upon oath to ſuch interrogatories as ſhall be adminiſtred to him; which interrogatories

rogatories must be exhibited within the first 4 days. 6 *Mod.* 73. And if any of the interrogatories is improper, the defendant may refuse to answer it, and move the court to have it struck out. *Stra.* 444. If the party can clear himself upon oath, he is discharged; if he confesses the contempt, the court will proceed to correct him by fine, or imprisonment, or both, and sometimes by a corporal, or infamous punishment. *Cro. Car.* 146. And if he refuses to answer, &c. he may be punished at the discretion of the court.

The attachment is obtained by motion of the court upon an *affidavit* of facts, and upon such motion, if the judges see sufficient cause to suspect that a contempt has been committed, they may grant a rule for the suspected party to shew cause why an attachment should not issue against him. *Styl.* 277. Or if the contempt is flagrant, the attachment issues in the first instance. *Salk.* 84. *Stra.* 185, 564. And upon affidavit of the service of the rule *nisi*, if insufficient cause be shewn to the contrary, an attachment issues.

ATTAINDER. When sentence of death is passed, the immediate consequence is *attainder*, Latin *attinctus*, *stained*; and the consequences of attainder, are *forfeiture*, and *corruption of blood*. When a person is attainted by judgment for offences punishable by death, he is dead in law. See CORRUPTION of BLOOD, and FORFEITURE.

ATTEMPT. An attempt to rob was anciently a felony, since that it was only a misdemeanour, and punishable with fine and imprisonment, 'till the *7th Geo.* 2. *c.* 21. which makes it a felony, transportable for 7 years. See ARSON.

ATTORNEY. See AUTHORITY.

ATTORNEY AT LAW. A client cannot change his attorney without leave of the court, to be obtained on a motion, though he be ever so great a cheat. 7 *Mod.* 50.

An attorney cannot be bail. 8 *Mod. Rep.* 339.

An attorney cannot be arrested but at the suit of an attorney of another court.

No man can, even with the consent of the parties, be attorney on both sides. 7 *Mod.* 47.

If a client receives an injury by the neglect or fraud of his attorney an action lies; or, if he suffers judgment to go against his client by *nil dicit*, when he had a warrant to plead the general issue. *Winch.* 90. Or, if he makes default in a plea of land, by which I lose the land. *Finch Law.* 188. Or, if he by collusion with A. and without

any warrant from B. appears for him in an action of treſpaſs at the ſuit of A. and ſuffers judgment by default and the inqueſt to paſs againſt him, whereby A. recovers againſt B. an action on the caſe will lie. *F. N. B.* 96. *Cro. Jac.* 695. *Stile* 426. *Comb.* 2.

ATTORNMENT. Was formerly the tenant's acknowledgment of his new lord; but by the 4 *and* 5 *Ann. & 11 G.* 2. *c.* 19. conveyances of manors, lands, reverſions, &c. are good without attornment, on notice given to tenants, &c.

AUDITA QUERELA, was a writ which a defendant was intitled to who had good matter to plead, but had no opportunity of pleading it; as where one having had judgment recovered againſt him, had after that period paid the plaintiff his debt, or had a general releaſe from him; notwithſtanding which the plaintiff taking advantage of the ſatisfaction not being entered upon record, is about to put the judgment in execution: but this writ is now diſuſed, and it's office ſupplied by a motion in the court for relief from ſuch oppreſſion.

AUTHORITY. A transfer, or delegation of power to act in the name and ſtead of another, muſt be by deed, that it may appear that the attorney or ſubſtitute had a commiſſion to repreſent the party, and that the authority was well purſued. *Co. Lit.* 48. *b.* 2 *Roll. Abr.* 8. Attornies are uſually made by letter or power of attorney.

If a man by will, give land to executors to be ſold, and one of them die, the ſurvivors may ſell; and executors may ſell part of the land at one time, and part at another, as they find purchaſers. *Co. Lit.* 113. But they cannot ſell by attorney.

Where a perſon is authorized to do a thing, it is moſt regular to do it in the name of him who gave the authority. 9 *Co.* 76. *b. Ld. Raym.* 1418. *Stra.* 705. *Godb.* 389. 1 *Roll. Abr.* 331. And without he purſues his authority ſtrictly, as to time, place, &c. his acts are void. *Plow.* 475.

Authorities cannot be transferred, for one who has an authority to do an act for another muſt execute it himſelf. 9 *Co.* 77. 1 *Roll. Abr.* 330. So, if a leſſee for life hath power to make leaſes rendering the ancient rent, he cannot make them by letter of attorney. 9 *Co.* 76. 1 *Roll. Abr.* 330. 2 *Roll. Rep.* 303.

The authority given by letter of attorney muſt be executed during the life of the perſon that gives it. 2 *Roll.*

Abr. 9. *Co. Lit.* 52. *Perk. ſ.* 188. But letters of attorney may be irrecoverable, when debts, &c. are aſſigned to receive them.

B.

BADGER. See LAND.

BAIL. Bail is where a perſon having been legally arreſted is ſet at liberty, upon proper ſureties given for his appearance at a day aſſigned. The word is derived from the French *bailler*, to deliver; and this branch of the legal practice is ſo called, becauſe he is as it were delivered to the ſureties as to a gaoler, or guardians, for his ſafe cuſtody and due appearance at the appointed time, when they may yield him up in diſcharge of themſelves. *Bract. l.* 3. 1 *Lill.* 173. And may indeed impriſon him themſelves to ſecure his appearance. 6 *Mod.* 231. 7 *Mod.* 77, 85, 98. 12 *Mod.* 275, 348, 606, 607, 667.

Bail is either in *civil* or *criminal* matters.

1. Bail in CIVIL cauſes is where one being arreſted for a debt or ſum of money due, is ſet at liberty upon ſecurity given.

When the ſheriff arreſts any one he is not only authorized, but obliged to take bail, if it be offered, or an action on the caſe lies againſt him. 2 *Sand.* 59. 1 *Vent.* 55, 85. 1 *Mod.* 33. 6 *Mod.* 122. 1 *Salk.* 99. 23 *H.* 6. *c.* 9. This bail to the ſheriff is called, bail to the writ, or bail *below*.

When the ſheriff has taken bail, if they be ſufficient and reſponſible perſons, the plaintiff may take an aſſignment of the bail bond, and bring an action thereon againſt ſuch bail; but if the plaintiff diſlikes the ſecurity taken by the ſheriff he may proceed againſt the ſheriff himſelf, by moving the court for a rule for the ſheriff to return the writ, and when this is done, by a like motion for the body of the defendant to be brought in; upon which, if the ſheriff does not cauſe ſufficient bail to be put in to the action, commonly called bail *above*, he himſelf will be reſponſible to the plaintiff. 1 *Vent.* 85. 1 *Mod.* 33, 57, 244. 12 *Mod.* 311, 485, 494, 516, 527, 557, 579. *Ld. Raym.* 399. 2 *Ld. Raym.* 849, 886. *Comyns* 132. *Stra.* 423. 4 & 5 *W. & M. c.* 4. Theſe bail may be diſcharged by ſurrendering the defendant into cuſtody within the time allowed by law; for which

which purpoſe they are at all times intitled to a warrant to apprehend him. 6 *Mod.* 231. 2 *Show.* 202.

If a perſon has ſeveral cauſes of action, each of which is too ſmall for ſpecial bail, he cannot join them to inforce ſpecial bail. 12 *Mod.* 527.

Heirs, executors, or adminiſtrators cannot, as ſuch, be held to ſpecial bail. 2 *Brownl.* 293. 3 *Bulſt.* 316.

If a ſheriff takes inſufficient bail, he is liable to an action as well as to amercements. 1 *Raym.* 425.

2. Bail in CRIMINAL cauſes. The grand queſtion with reſpect to bail in criminal cauſes is, In what caſes the criminal ought or ought not to be admitted to bail? for to refuſe bail to him who ought to have it, is as great an offence to the liberty of the ſubject, as to grant it where it ſhould be refuſed is to the good of the public. We may lay down two general rules to be obſerved as to bail in criminal cauſes; the firſt is, that it ſhould regularly be allowed in ſuch caſes where it ſeems doubtful, whether the party accuſed be guilty of the offence or not. 2 *Inſt.* 189. 2. The offender may be bailed in all offences, whether againſt the Common Law or act of Parliament, that are below felony, unleſs it be ſpecially prohibited by ſome act of Parliament. 2 *Hal. P. C.* 127.

If a perſon be bailed by inſufficient ſureties, he may be required either by him who took the bail, or by any other perſon who hath power to bail him, to find better ſureties, and on his refuſal may be committed; for inſufficient ſureties are as none. *Dalt. c.* 70. 114. If the party bailed by inſufficient ſureties do not appear according to the condition of the recognizance, the juſtice, &c. who bailed him is fineable by the juſtices of aſſize; but if he appear, it ſeems that the perſon who bailed him is excuſed. *Hales P. C.* 97. 2 *Hawk. P. C.* 89.

The demanding exceſſive bail is conſidered as a great grievance. 2 *Hawk. P. C.* 89.

The bailing a perſon not bailable by law, is puniſhable at the Common Law as a negligent eſcape, and is alſo an offence againſt the ſtat. *Weſtm.* 1. *c.* 15. 27 *E.* 1. *c.* 3. 4 *E.* 3. *c.* 2. *&* 1 *&* 2 *Ph. & M. c.* 13.

If bail be denied where the party ought to be bailed, it is a miſdemeanour puniſhable not only by action at the ſuit of the party, but alſo by indictment. 2 *Hawk. P. C.* 90. See ATTORNIES.

BAIL-

BAIL-BOND. See BAIL.

BAILIFF. See FALSE IMPRISONMENT and HOUSE.

BAILMENT, from the French *bailler*, to deliver, is a delivery of goods to another upon truſt, upon a contract (expreſſed or implied), that the truſt ſhall be faithfully executed on the part of the bailee.

A bailee ought not to uſe ſuch goods as though he had an intereſt in them, the undertaking being only to keep them, *Co. Lit.* 89. *a.* 4 *Co.* 83. *b. Doct. & Stud.* 129. ſee 1 *Raym.* 665. Therefore if the bailee of a beaſt, which has been delivered to him to be kept, kills or uſes it, he is liable to make ſatisfaction for this abuſe of an authority given him by the owner. *Bro. Treſp. pl.* 295. *pl.* 327. *Bro. Act. ſur le caſe, pl* 99.

If A. leaves a cheſt lock'd with B. to be kept, and takes away the key, without acquainting B. with the particulars, the goods in the cheſt are in poſſeſſion of A. for ſince he keeps the key the goods are locked out of the poſſeſſion of B. who, being unacquainted with the particulars, cannot be ſuppoſed to have them under his cuſtody; ſo that neither the poſſeſſion nor uſe of the goods are in B. for though the poſſeſſion of the box is in B. yet is he ſhut out from the poſſeſſion of the goods in the box, for that cannot be ſaid to be in his poſſeſſion that he cannot take hold of and remove, or order. *Co. Lit.* 89. *a. b.* 4 *Co.* 83.

The naked poſſeſſion of chattels perſonal cannot be alienated, or handed about from one to another. *Bro. Attach. on Aſſize* 20.

If the goods of A. are delivered or bailed by B. to C. C. muſt deliver them to B. from whom he had them, and not to A. whoſe remedy is againſt B. 1 *Roll. Abr.* 607. But if B. dies, his executors are chargeable only to C. that has right, for the executors came to the poſſeſſion by the law. 1 *Roll. Abr.* 607.

If A. puts his beaſts into B.'s paſture, on agreement to pay B. 6d. per week for the paſturage: B. cannot retain the beaſts of A. 'till he has paid the money, unleſs this were provided by their expreſs agreement; but the only remedy that B. hath is upon the contract, by action on the caſe. *Cro. Car.* 271. 2 *Roll. Abr.* 92.

But if a horſe be committed to an hoſtler, he may detain him 'till he is paid for his meat. 8 *Co.* 147. 39 *H.* 6. 18. 5 *H.* 7. 15. 2 *Roll. Abr.* 85.

So

So if cloth be committed to a taylor to make up into a garment, he may detain the cloth until he is ſatisfied for his labour. 22 *E.* 4. 49. *Cro. Car.* 271. 8 *Co.* 147. For in theſe laſt caſes, which are in the way of public entertainment and trade, the law annexes a condition, though not expreſſed, that they ſhall be retained 'till the party is paid for his trouble and charge about them.

If A. ſells B. a horſe for 20s. A. may retain the horſe unleſs the money be actually paid, or conditioned to be paid at a future day; for unleſs there be *quid pro quo* the property is not altered. 5 *E.* 4. 2, 6.

A bailee (as well as the bailer) is intitled to an action by reaſon of his qualified property in the goods, if they are damaged or taken away. 1 *Roll. Abr.* 607. 13 *Rep.* 69. 13 *Co.* 69.

A general bailment will not charge the bailee with any loſs, unleſs it happens by groſs neglect, which is conſtrued to be an evidence of fraud; but, if the bailee undertakes ſpecially to keep the goods ſafely and ſecurely, he is bound to anſwer all perils and damages that may befal them for want of the ſame care with which a prudent man would keep his own. *Ld. Raym.* 909. 12 *Mod.* 487.

If A. deliver goods to B. to be delivered over to C. C. hath the property, and conſequently an action againſt B. 1 *Roll. Abr.* 606.

If A. take a gelding to paſture, and the gelding be ſtolen, no action lies againſt A. unleſs he had made a ſpecial *aſſumpſit* to deliver him; for the undertaking of A. is to feed the gelding in the fields, and in the open air, and not to keep him ſafely as the hoſtler is obliged to do in his ſtable; and the law will not ſtretch mens promiſes beyond their firſt undertaking. *Moor* 543. See CARRIER, INNKEEPERS, PLAINTIFF, PAWNING, &c.

BANK NOTE. A. who came to the poſſeſſion of a bank note, the property of B. by robbing the mail, parted with it to C. for a valuable conſideration. Payment of this note being ſtopped at the Bank, C. brought an action of trover againſt the caſhier of the Bank, who had ſigned it. Upon a caſe reſerved it was held that the action was well brought: and by Lord C. J. Mansfield, if a man did not in every caſe acquire a property in a bank note by giving a valuable conſideration for it, an end would ſoon be put to the

the circulation of bank notes. *MS. Rep. Miller & Rau. Hil.* 31. *G.* 2. *B. R.*

BANKRUPT. A bankrupt is one who, getting his living by buying and ſelling, does ſome act which tends to defraud and injure his creditors.

I have intimated that it is eſſential to the conſtituting a man a bankrupt, that he ſhould get his living by buying and ſelling; and this leads me to conſider who may, and who may not be bankrupts.

Among ſuch therefore that may become bankrupts (being perſons getting their living by buying and ſelling) are ſhoemakers, *Cro. Eliz.* 268. 3 *Mod.* 330. Weavers, dyers, *Cro. Jac.* 584. Taylors. *Dav.* 25. Carpenters that ſell wrought timber, but not mere working carpenters, taylors, &c. 3 *Mod.* 155. *Stone* 120. *Ld. Raym.* 741. So may a trading ſmith, *Good.* 2. An ironmonger, *Good.* 11. *Stone* 120. A clothier, *Good.* 12. A cow-keeper, *Good.* 13. A farmer, *Hutt.* 46. 3 *Mod.* 330. A baker, 3 *Mod.* 330.

By the 5*th G.* 2. *c.* 30. *ſ.* 39. bankers, brokers, and factors are declared to be liable to the ſtatutes of bankruptcy; but no farmer, grazier, or drover, ſhall, as ſuch, be ſo liable, *ſ.* 40.

An innkeeper, as ſuch, cannot be a bankrupt, *Cro. Car.* 549. *Skinn.* 291.; but a victualler, vintner, or brewer may. *Ld. Raym.* 287. 12 *Mod.* 159. *Stone* 129,

One ſingle act of buying and ſelling will not make a man a trader, conſequently not liable to be a bankrupt. 1 *Danv.* 687.; nor will buying and ſelling ſtock. 2 *Will. Rep.* 308.

But a wife in London, if ſhe be a ſole trader according to the cuſtom, is liable to a commiſſion of bankrupt. *M.* 6 *G.* 3. *B. R. Stone* 119.

Commiſſions of bankruptcy are not grantable where the debt of one or two petitioning creditors, being partners, does not amount to 100l. or upwards, or of two, to 150l. or of three or more, to 200l. of which an affidavit or affirmation muſt be made. If the petitioning creditor fails in the neceſſary proofs as to the amount of his debt, or the act of bankruptcy, he may be put to very great expence.

A commiſſion of bankruptcy cannot be granted upon the petition of an aſſignee of a bond; for though he is an equitable he is no legal creditor. 2 *Stra.* 899. But perſons having

having bills, bonds, notes, or other perſonal ſecurity, payable at a future day may petition. 5 *G.* 2. *c.* 30. *ſ.* 22.

A debt contracted after the act of bankruptcy committed is no ground for a commiſſion. 2 *Stra.* 744. But a bond taken after ſuch act for a ſimple contract debt due before, is. 2 *Stra.* 1042.

Where commiſſioners of bankrupt do not purſue the acts of parliament, &c. they are liable to an action 4 *Inſt.* 277. 8 *Rep.* 12. *a.* 4 *Mod.* 116. *Raym.* 337.

They may examine the bankrupt or other perſon touching his trade, dealings and effects. 5 *G.* 2. *c.* 30 *ſ.* 16. And may by a judges warrant commit him, if he refuſe to be examined. 2 *Eq. Abr.* 99. *pl.* 8.

They have power to examine a wife upon oath, for the diſcovery of the bankrupt's effects: but not touching his bankruptcy, as to how or when he became bankrupt, &c. *Will. Rep.* 610, 611.

A perſon once examined cannot be examined again without a new commiſſion. 2 *Show.* 102.

Of Tranſactions with Bankrupts.

Where a perſon ſoon after he becomes a bankrupt pays a debt to a creditor, who had no notice of the bankruptcy at the time he received the money, the aſſignees may recover the money ſo paid in an action of *Trover*, but not on an *indebitatus aſſumpſit*, for they cannot inſiſt upon having the money by way of *contract*, but as a *tort*. *Barnard Ch. Rep.* 207. But by the 19*th* *G.* 2. *c.* 32. it is declared, "that no *bona* "*fide* creditor of a bankrupt, in reſpect of any goods really "and *bona fide* ſold to ſuch bankrupt, or for or in reſpect of "any bill of exchange, really and *bona fide* drawn, nego- "tiated, or accepted by ſuch bankrupt, in the uſual and "ordinary courſe of trade and dealing, ſhall be liable to re- "fund, &c. any money which before the ſuing forth of "ſuch commiſſion was really and *bona fide* in the uſual and "ordinary courſe of trade and dealing, received by ſuch "perſon of any ſuch bankrupt, before ſuch time as the per- "ſon receiving the ſame ſhall know, underſtand, or have "notice, that he is become a bankrupt, or that he is in in- "ſolvent circumſtances." See 2 *Show.* 522. And it is ſaid *Vern.* 27. That equity will not compel a man to diſcover what goods he really bought of a bankrupt after the bankruptcy, and before the commiſſions ſued out, where the party had no notice of the bankruptcy.

A ſale of goods by a bankrupt, after an act of bankruptcy, is not merely void, but voidable only, for tho' it is good between the parties, it may be avoided or not avoided by the commiſſioners or aſſignees at pleaſure; therefore they may either bring *trover* for the goods; as ſuppoſing the contract may be void, or may bring *debt* or *aſſumpſit* for the value which he affirms the contract. 3 *Salk.* 59. *pl.* 2. 11 *Mod.* 324.

If a man, after notice of the bankruptcy, voluntarily pays money to a bankrupt, it is in his own wrong, and he may be forced to pay it again; but it is otherwiſe if the bankrupt recovers it of him by due courſe of law. *Vern.* 94. 2 *Vent.* 358.

No *bona fide* purchaſer of lands on a good or valuable conſideration ſhall be affected by the bankrupt laws, unleſs the commiſſion be ſued forth within 5 years after the act of bankruptcy committed. 1 *Jac.* 1. *c.* 15. See ACT of BANKRUPTCY and ASSIGNEES of BANKRUPT.

BAR of DOWER. A widow's dower may be barred by elopement, divorce, by being an alien, by the treaſon of her huſband, and alſo by her detaining the title deeds, or evidences of the eſtate from the heir; until ſhe reſtores them. *Co. Lit.* 32. and by the 6*th E.* 1. *c.* 7. commonly called the ſtatute of Glouceſter, if a dowager alienes the land aſſigned her for dower, ſhe forfeits it *ipſo facto*, and the heir may recover it by action. A woman may alſo be barred by levying a fine or ſuffering a recovery of the lands, during her marriage: but the moſt uſual method is by ſettling a jointure on the wife either before or after marriage. See JOINTURE.

BARGE. See LAND.

BARRATRY. A barrator is a common mover, and exciter of ſuits and quarrels either at law or otherwiſe: and it ſeems clear that no man can be a barrator in reſpect to one or two acts only; for every indictment for ſuch crime muſt charge the defendant with being a *common barretor*. 1 *Hawk. P. C.* 343. 8 *Co.* 36. 2 *Roll. Abr.* 39.

If the aggreſſor be a common perſon, the uſual puniſhment is (upon an indictment) fine and impriſonment, and alſo binding them to a good behaviour; but if they are of the profeſſion of the law, it is ſaid, they may be farther puniſhed by being diſabled to practice. *Hut.* 104. 1 *Hawk. P. C.* 244.

An offence very ſimilar to this is the ſuing another in the name of a fictitious plaintiff; either of one who has no being

or

or who is ignorant of the ſuit. This offence, if committed in any of the king's ſuperior courts, is puniſhable at the judges diſcretion; but in the lower courts it is directed by the 8 *Eliz. c.* 2. to be puniſhed by 6 months impriſonment, and treble damages to the injured party. See MAINTENANCE.

BARON and FEME. If a huſband beat his wife in a cruel manner, or if he threaten to uſe her barbarouſly, or to beat her outrageouſly, ſhe may bind him to the peace, by ſuing out a writ of *ſupplicavit* out of chancery, or ſhe may apply to the ſpiritual court for a divorce *propter ſævitiam.* Which ſhe may alſo do if he impriſon her. *Dalt. c.* 68. *Lamb* 78. *Crom.* 133. *Preced. in Chancery* 492. *per cur.*

The law has given the huſband an abſolute power of diſpoſing of or deviſing the wife's perſonal property, as goods, money, cattle, &c. and if he does not diſpoſe of them they will go to the huſband's executors or adminiſtrators, and not to the wife though ſhe ſurvives him. But the freehold and inheritance is ſubject to other rules, for the huſband by the marriage does not become abſolute proprietor of the inheritance, and cannot make an abſolute ſale of it without her conſent; but may receive the profits of it during her life. And if a wife is ſeiſed in fee the huſband has a freehold *in right of his wife.* 10 *Co.* 42. 2 *Inſt.* 510. 1 *Sid.* 11. 1 *Roll. Abr.* 347. *Co. Lit.* 351.

The marriage is a gift in law to the huſband of all the wife's chattels real, as a term for years in right of the wife: ſo of eſtates by ſtatute merchant, ſtatute ſtaple, elegit, &c. And of theſe he may alone diſpoſe or forfeit, or they may be extended for his debts, but if he make no diſpoſition of them in his life-time, they ſurvive to the wife, and therefore he cannot deviſe them. 7 *H.* 6. 1. *b. Bro.* 24. *Co. Lit.* 46. 351.

Things in action, as debts due to the wife by bond, &c. which are to be demanded by action, tho' they are ſo far veſted in the huſband, that he may reduce them into poſſeſſion, &c. yet if he dies before any ſuch alteration made by him, they ſhall go to his wife; nor ſhall they, without ſuch alteration, ſurvive to the huſband upon the death of the wife, or he have any right to them, but as he is intitled as adminiſtrator to her. *Co. Lit.* 351. 3 *Mod.* 186. By the ſtatute 29. *Car.* 2. *c.* 3. *ſ.* 25. it is enacted, that the ſta-

tute of diſtributions ſhall not extend to the eſtates of feme-coverts.

The huſband has the ſame right to things real or perſonal accruing to the wife during marriage, as if ſhe were ſeiſed of them before marriage. *Co. Lit.* 351. 1 *Salk.* 115. *Carth.* 251.

But a man by deed or will may give any thing *in truſt* for the ſeparate uſe of a wife; ſo as to put it out of the power of the huſband. 2 *Vern.* 659.

The huſband is liable to the wife's debts contracted before marriage, whether he had any portion with her or not. *F. N. B.* 265. 1 *Roll. Abr.* 352. 3 *Mod.* 186.

But if a woman being indebted marries and dies, the huſband ſhall not be charged, for he is not liable to her debts contracted before coverture, unleſs recovered in her life time. 1 *Roll. Ab.* 351. 3 *Mod.* 186.

But if a huſband and wife are ſued on the wife's bond, entered into by her before marriage, and judgment is had thereon, and the wife dies before execution; yet the huſband is liable, for the judgment has altered the debt. 1 *Sid.* 337.

If a man marries an adminiſtratrix to a former huſband, who in her widowhood waſted the aſſets of her inteſtate, the huſband is liable to the debts of the inteſtate, during the life of the wife; and this ſhall be deemed a *devaſtavit* in him. *Cro. Car.* 603.

The Wife's Realty.

The real eſtate of the wife, as has been before obſerved is under very different regulations to her perſonalty; for the realty is not under the power of the huſband, any longer than the coverture: and therefore any diſpoſition of it made by him alone may be defeated; alſo all charges laid on it by him fall off with his death. 1 *Roll. Abr.* 346, 347. 2 *Inſt.* 510. 10 *Co.* 42. 1 *Sid.* 11. And by the 32 *H.* 8. *c.* 28. it is enacted, *that no fine levied by the huſband alone of lands, being the freehold and inheritance of the wife, ſhall in any wiſe be or make a diſcontinuance, or be otherwiſe prejudicial to her or her heirs, but that the wife and her heirs ſhall and may lawfully enter into the ſaid lands, according to their rights and titles therein.* But if ſhe neglects to enter within five years after the death of her huſband, and the fine was with proclamation, her entry is taken away, and her right for ever extinguiſhed.

Co.

Co. Lit. 326. *Dyer* 72, 162. *Plowd.* 373. 8 *Co.* 72. 2 *Inſt.* 681. 9 *Co.* 140.

If lands be given to the huſband and wife, and the heirs of their bodies, and the huſband alone levies a fine thereof, the wife may enter after his death by force of this ſtatute. 9 *Co.* 138. 2 *Inſt.* 681. *Cro. Car.* 477.

A recovery ſuffered of the wife's lands by the huſband alone is void. *Booth* 185. 2 *Inſt.* 343. *Plowd.* 57.

If a wife levies a fine of her own inheritance, without her huſband, this ſhall bind her and her heirs; becauſe they are ſtopped to claim any thing in the land, and cannot be admitted to ſay ſhe was a covert againſt the record; but the huſband may enter and defeat it, either during the coverture, to reſtore him to the freehold he held in the right of his wife, or after her death, to reſtore himſelf to his tenancy by the curteſy; becauſe no act of a wife can transfer that intereſt which the intermarriage has veſted in the huſband; and if the huſband avoids it during the coverture, the wife or her heirs ſhall never afterwards be bound by it. *Bro. Tit. Fines* 33. 10 *Co.* 43. *Hob.* 225. 7 *Co.* 8. *Co. Lit.* 46.

If a huſband and wife join in a fine to convey her own inheritance, it ought to be received, if upon her examination it appears to be voluntarily and free from conſtraint; and if ſhe be of full age, the fine ſhall bind her, as if ſhe had been ſole. 1 *Roll. Abr.* 347. 2 *Roll. Abr.* 20. 2 *Inſt.* 515.

If a huſband and wife levy a fine, and the wife is within age, they may join in a writ of error to reverſe it during the minority of the wife, not by any privilege of coverture, but becauſe, no act of hers during her infancy can be ſo binding as not to be cancelled, if ſhe thinks it prejudicial to her. *F. N. B.* 21. 1 *Leon.* 15. 3 *Lev.* 36.

A married woman is capable of purchaſing, for ſuch an act does not make the property of the huſband liable to any diſadvantage, and the huſband is ſuppoſed to aſſent to this, as being for his advantage; but the huſband may diſagree, and it ſhall avoid the purchaſe; but if he neither agrees or diſagrees, the purchaſe is good, for his conduct ſhall be eſteemed a tacit conſent, ſince it is to turn to his advantage: but in this caſe tho' the huſband ſhould agree to the purchaſe, yet after his death ſhe may wave it; for having no will of her own at the time of the purchaſe, ſhe is not indiſpenſibly bound by the contract; therefore if ſhe does not, when under her own management and will, by ſome act ex-

preſs her agreement to ſuch purchaſe, her heirs ſhall have the privilege of departing from it. *Co. Lit.* 3. *a.*

Of a Wife's being conſidered as unmarried.

A huſband who has abjured the realm, or who is baniſhed, is thereby *civilly dead*, and being diſabled to ſue or be ſued in the right of his wife, ſhe muſt be conſidered and ſue or be ſued as unmarried. *Co. Lit.* 133. *a.* 1 *Roll. Rep.* 400. *Moor* 851. 3 *Bulſt.* 188. 1 *Bulſt.* 140. 2 *Vern.* 104.

In an action of aſſumpſit the defendant proved that ſhe was married, and her huſband alive in *France*; the plaintiff had judgment, upon which as a verdict given againſt evidence, ſhe moved for a new trial, which was denied; for it ſhall be intended that ſhe was divorced; beſides, the huſband is an alien *enemy*: and in that caſe why is not his wife chargeable as a feme ſole? 1 *Salk.* 116. *Comb.* 402. 1 *Salk.* 116. 2 *Salk.* 646. *Ld. Raym.* 147.

A woman, whoſe huſband had left her about 12 years before, had carried on a trade in her own name as a widow, and gave receipts in her own name; being ſued for debt contracted in the courſe of her trade, gave coverture in evidence, and gave evidence of her huſband's having been lately alive in Ireland; and Holt directed the jury to find for the defendant, which they did. 12 *Mod.* 603.

A wife is not guilty of felony in ſtealing her huſband's goods. 1 *Hawk. P. C.* 93.

She may be indicted together with her husband, for keeping a bawdy-houſe. 1 *Hawk. P. C.* 2. See COMPULSION.

If the wife incur the forfeiture of a penal ſtatute, the huſband may be made a party to the action or information, as he may indeed to any ſuit for a cauſe of action given by the wife, and ſhall be liable to anſwer what ſhall be recovered thereon. 1 *Hawk. P. C.* 3.

If a wife pretending herſelf to be ſole, marries a ſecond huſband, he ſhall have no action againſt the firſt, becauſe this action is founded upon the communication and contract of the wife, which ſhall not bind the huſband; beſides this is felony. 1 *Sid.* 375. 1 *Lev.* 247.

A huſband ſhall be anſwerable for a treſpaſs done by her, or for ſlanderous words ſpoken by her. 2 *H.* 6. 22. *Keilw.* 61. 1 *Roll. Abr.* 251. 1 *Leon.* 122. *Cro. Car.* 376.

As to the Wife's Contracts for Neceſſaries, &c.

The huſband is obliged to maintain his wife, and may by law be compelled to find her neceſſaries; as meat, drink, clothes,

clothes, phyſic, lodging, &c. ſuitable to his circumſtances; it ſeems alſo ſettled that the wife is not to be her own carver, and that ſhe hath not an abſolute power of binding the huſband by any contract of hers, though for neceſſaries, without his conſent precedent or ſubſequent; the law therefore in theſe caſes, is to leave it to the jury to find whether the huſband conſented or not; and though no expreſs conſent or agreement of his be proved, yet if it appears that ſhe cohabited with her huſband, and bought neceſſaries for herſelf, children, or family, the huſband ſhall be chargeable, and the jury may find, on their oaths, that they came to the huſband's uſe, he being by law obliged to provide for thoſe; alſo if ſhe cohabits with her huſband, and is ever ſo lewd, he ſhall be liable to find her neceſſaries, for he took her for better for worſe; ſo if he runs away from her, or turns her away, or forces her by cruelty or ill uſage to go away from him: but if he allows her a ſeparate maintenance, or prohibits particular perſons from truſting her, he ſhall not be liable during the time that he pays ſuch ſeparate maintenance, nor for neceſſaries taken up of thoſe perſons particularly prohibited; for in theſe caſes no conſent, but rather the contrary appears; but a general warning or notice in the *Gazette* or other newſpaper, not to truſt her, is not a ſufficient prohibition. Alſo the jury are to determine as to the wife's neceſſity, the huſband's degree and circumſtances, and the value of the things ſold and delivered, and give a verdict, and aſſeſs damages accordingly. 11 *H.* 6. 30. *Fitz. Debt* 41. *Brownl.* 47. *All.* 61. *Litt. Rep.* 307. *Hutt.* 105. *Jenk. Rep.* 4. 1 *Roll. Abr.* 350, 351. 1 *Sid.* 109, 110, &c. 1 *Mod.* 128. 2 *Vent.* 155. 1 *Keb.* 69, 80, 87. 2 *Vent.* 42. 1 *Lev.* 4, 5. 1 *Salk.* 116, 118. 6 *Mod.* 171. 2 *Show.* 283. *Skin.* 348. See *Stra.* 647, 706. 2 *Stra.* 875.

And if a perſon receives a woman who runs away from her huſband, and lays out money for her, though he had no notice, the huſband ſhall not be charged; becauſe the wife was eloped. 11 *Mod.* 241. 1 *Stra.* 647. 1 *Lev.* 5.

When a woman departs from her huſband without his conſent, and he, during her abſence, prohibits J. S. to truſt her, and after ſhe requeſts her huſband to cohabit again with her, and he refuſes to receive her; and yet J. S. ſells to her ſilk to the value of 40*l.* which is found ſuitable to the degree of her huſband, yet the huſband ſhall not be charged: for the huſband's prohibition takes away all preſumption

ſumption of the huſband's conſent to the contract. 10 *Mod* 6, 33, 70, 163. *Ld. Raym.* 444, 445. *Will. Rep.* 482, 483. 2 *Barnes's C. P.* 72, 74, 8 ›.

If a woman takes up goods, and pawns them before they are made into cloaths, the huſband ſhall not pay for them, becauſe they never came to his uſe: But it is otherwiſe if made up, worn, and then pawned. 1 *Salk.* 118.

If ſhe pawns her cloaths, and borrows money to redeem them, her huſband is not liable. 2 *Show.* 283. For though ſhe may in ſome circumſtances contract for neceſſaries, ſhe cannot borrow money to buy them with.

If a huſband and wife by agreement live ſeparate, and ſhe has a ſeparate maintenance, it will be preſumed that thoſe who deal with her, truſt her on her own credit. 1 *Salk.* 116. Vide *Skin.* 348.

Warning a tradeſman's ſervant not to truſt a wife, is a ſufficient notice to the maſter. 1 *Salk.* 118.

Separate Maintenance.

A wife who has a ſeparate maintenance, may ſue without her huſband. 1 *Chan. Ca.* 35.

She may alſo diſpoſe of what ſhe ſaves out of it, by will. 1 *Chan. Ca.* 118. 1 *Vern.* 245.

Agreement.

Agreements between huſband and wife, before marriage, are generally extinguiſhed by the marriage. But if a man in conſideration of marriage promiſes to leave her worth 500 *l.* this is no duty in the life of the huſband, and therefore is not releaſed or extinguiſhed. *Cro. Jac.* 571, 623.

Injuries to a Wife.

If a wife has been falſely impriſoned, her huſband may, by an action of treſpaſs, recover a ſatisfaction for the damage he has ſuſtained, by having been deprived of the company and comfort of his wife, and by the buſineſs of his houſe having been neglected during her abſence. *Sal.* 119. *Ruſſell and Corre. Cro. Jac.* 502. *Cro. Car.* 90.

If the wife of A. who has loſt her way, has been carried by B. home to his houſe, an action of *treſpaſs* lies; for as ſhe might have found her way again, the doing of this was unlawful. *Bro. Treſp. pl.* 213. But if ſhe is in danger of being loſt in the night, or of being drowned, it is lawful for him to carry her home to his houſe. *Ibid.*

If the wife of A. is walking towards a market, it is lawful for B. to ſuffer her to ride behind him thither. *Bro. Treſp. pl.* 207.

If

If the wife of A. aſks B. to carry her before a juſtice of peace, for the purpoſe of craving the ſurety of the peace againſt her huſband, it is lawful for B. to do this. *Ibid.*

If the wife of A. gives or ſells, and delivers any of her huſband's goods to B. who carries them away, an action of treſpaſs, *vi & armis* will not lie againſt B. for this taking away: But *Q. Bro. Bar. and Feme. pl.* 36. *and Treſp. pl.* 92. See COMPULSION, DEFENDANTS, MARRIAGE, and PLAINTIFFS.

BASTARDY. A baſtard at the common law is one born out of lawful matrimony; but by the civil law, thoſe that are born before marriage are legitimated by a ſubſequent marriage; becauſe, ſay the canoniſts, the ſubſequent marriage ſhews a conſent from the beginning. 47 *E.* 3. 14. *b.* 11 *H.* 4. 81. *Bract. lib.* 5. *fo.* 416. 1 *Roll. Abr.* 624.

If a huſband be proved *caſtrate*, the iſſue are baſtards, 1 *Roll. Abr.* 358. So, if the huſband be under the age of fourteen. *Co. Lit.* 244. 1 *Roll. Abr.* 359. Or, if the huſband be not within the four ſeas during the time that paſſes between the conception and birth of the child. *Idem.*

In trials of baſtardy at this day, if the jury find that the huſband had not acceſs, though the husband and wife lived in *England*, the child is a baſtard; but this proof muſt be *clear*, otherwiſe acceſs will be preſumed in favor of ligitimation. 1 *Salk.* 123. And the wife cannot in this caſe be examined as a witneſs. *Hardw.* 79.

If a marriage is made void by divorce, the iſſue are baſtards; as if they be divorced for pre-contract, conſanguinity, affinity, or frigidity. 1 *Roll. Abr.* 358, 359, 360. But in theſe caſes the iſſue are eſteemed legitimate till there be a divorce. 1 *Roll. Abr.* 357.

If a woman marries when very big, it is the child of the huſband: for their marriage is a conſent that the child is his. 1 *Roll. Abr.* 358.

If there be a ſeparation for adultery *from bed and board*, the iſſue born afterwards are preſumed not to be the huſband's, unleſs it be proved that the husband after ſuch ſeparation did cohabit with her. 1 *Roll. Abr.* 359. 1 *Salk.* 123.

As to the legitimation of children born after the death of the huſband, the uſual time of birth is nine ſolar months and ten days; but it may be haſtened or prolonged by accident: as by hard uſage, want of ſuſtenance, *&c.* ſo that a child hath been allowed legitimate nine months and twenty days after the father's death; but if the child is born eleven months

months after the husband's death, and it is proved the father could not enjoy his wife within a month before his death, it is to be conſidered as a baſtard. *Palm.* 9. 1 *Roll. Abr.* 356. *Godolph.* 281. *Stile* 277.

A wife marries immediately after her husband's death, and hath a child nine months and eleven days after the death of her firſt husband; it was adjudged the ſecond huſband's, becauſe it was born one day after the uſual time, and the uſual time is the only meaſure to diſcern between them; but if it be born at the end of nine months and ten days, the father is doubtful, and ſome have ſaid, that the child might chuſe his father. 1 *Roll. Abr.* 357. *Co. Lit.* 8. *a. Bro.* 97.

General baſtardy is tried by the biſhop, and is where ſuch baſtardy is not made legitimate by a ſubſequent marriage, and where it is a point collateral to the original cauſe of action.

Special baſtardy, is always tried by a jury in the temporal courts, and is, where the baſtardy is the cauſe of the action, and the material point in iſſue, and where thoſe are baſtards at the common law, that are muliers by the ſpiritual law, and ſuch are thoſe that are born before marriage, whoſe parents afterwards intermarry.

A man who hath iſſue a ſon by a woman before marriage, and afterwards marries the ſame woman, and hath iſſue a ſecond ſon born after the marriage; the firſt is a *baſtard eigne*, and the ſecond a *mulier*, and ſuch baſtard eigne, is as incapable of inheriting as if they had never married, unleſs upon the death of the father the *baſtard eigne* enters, and the *mulier* during his whole life never diſturbs him, in which caſe he cannot, upon the death of the *baſtard eigne* enter upon his iſſue, but there muſt be a deſcent to the iſſue of the baſtard eigne, for if he die leaving iſſue in his wife's womb, and the mulier enter, and then the ſon is born, here becauſe there was no deſcent, the ſon of the baſtard eigne is for ever excluded. *Lit. Sect.* 399. *Co. Lit.* 245. 1 *Roll. Abr.* 624. *Co. Lit.* 244. *Hughes* 365.

If juſtices of the peace adjudge a child a baſtard which is not ſo, an action lies againſt them. *Comb.* 482.

Baſtard children gain a ſettlement in the place where they are born; but if a woman big with child, and a baſtard, is by order of two juſtices removed from the pariſh of A. to B. as her laſt place of ſettlement, from which order B. appeals, but before the next ſeſſions ſhe is delivered of a baſtard

child in B. and afterwards the order of the two juſtices is vacated, the child muſt follow the mother, and gain a ſettlement in A. *Carth.* 397. 1 *Salk.* 121. 5 *Mod.* 204. *Comb.* 360.

By the 18 *Eliz. c.* 3. Two juſtices may take order for the puniſhment of the mother and reputed father, which was ſuppoſed to intend corporeal puniſhment. *Dalt. Juſt. c.* 11. But by the 7 *Jac.* 1. *c.* 4. commitment to the houſe of correction there to be ſet on work for a year, and for a ſecond offence till ſhe find ſureties never to offend again, is inflicted on the woman only. But in both caſes, it ſeems that the penalty can only be inflicted if the baſtard becomes chargeable to the pariſh.

When a woman is delivered, or declares herſelf with child, of a baſtard, and will by oath before a juſtice of peace charge any perſon with having got her with child, the juſtice ſhall cauſe him to be apprehended and commit him till he gives ſecurity, either to maintain the child, or appear at the next quarter ſeſſions to diſpute and try the fact. But if the woman dies, or is married before delivery, or miſcarries, or proves not to have been with child, the perſon is diſcharged: Otherwiſe the ſeſſions, or two juſtices out of ſeſſions, upon original application to them, may take order for the keeping of the baſtard, by charging the mother or reputed father with the payment of money or other ſuſtentation for that purpoſe. If the parents run away, the overſeers, by direction of two juſtices, may ſeize their rents, goods and chattels in order to maintain ſuch child.

Baſtards can be heirs to no man. 1 *Inſt.* 143. But tho' they have no ſurname by inheritance, they may purchaſe to them and their heirs by their ſurname of reputation: and a remainder may be limited to them by the deſcription of ſon of his reputed father; tho' he may not take by the name of iſſue, or by limitation before born, nor may a uſe be raiſed to ſuch reputed ſon; and he is not within the ſtatute of wills, where lands are given to him as ſuch a one's child: But by the reputed name a man may deviſe all his eſtate to a baſtard. 1 *Inſt.* 3. 6 *Rep.* 65. *Dyer* 374. And a limitation to a baſtard in being is good, tho' it is not ſo before born. *Cro. Eliz.* 509. See FAME.

TTERY. For this crime, conſidered as a private injury, an action of treſpaſs *vi & armis* is the proper remedy, and the injured

injured party ſhall have his damages aſſeſſed according to the injury he has ſuſtained. See ASSAULTS.

Whatever injury a man may receive in his perſon from another if it be a wilful and ſerious act, it is in the eye of the law a battery. And ſome ſtroke or blow muſt be actually given or ſome act done which reaches the perſon of the party to conſtitute a battery.

As, if one in an angry or revengeful, rude or inſolent manner, ſpits or throws liquor in another's face, or any way touches or violently juſtles another, an action of battery will lie. But if it be done by accident, or unavoidable neceſſity it will not lie altho' it be in conſequence of a voluntary act. 6 *Mod.* 149. 172. *Ld. Raym.* 62. 231. 1 *Hawk. P. C.* 134. *Hob. pl.* 176.

And it is ſaid that it is no battery to lay one's hands gently on a man when an officer has a warrant to arreſt, and to tell the officer that this is the man he wants. 1 *Hawk. P. C.* 134. 2 *Roll. Abr.* 546.

Or, if two by conſtant play at cudgels, and one happens to hurt the other, as their intent was laudable in promoting courage and activity, it does not amount to a battery. *Dalt. cap.* 22. *Bro. Coron.* 229.

But an action of treſpaſs *vi & armis* does ſometimes lie altho' there was no deſign to hurt, as if it be through groſs inattention, negligence or default. *Latch.* 13. 110. *Hob.* 134. As where one uncocking his gun diſcharged it by which another, who was ſtanding by and looking on, was wounded, it was held that this action lay. *Str.* 596. And if a ſoldier exerciſing, accidentally wounds a man by the diſcharge of his gun, this does not amount to a battery except there was any want of due caution in him. *Hob.* 134.

It is ſaid that the party may juſtify in an aſſault and battery, if (*a*) an officer, having a warrant againſt one who will not ſuffer himſelf to be arreſted, hurt or wound him in the attempt to take him; or, if a parent (*b*) in a reaſonable manner chaſtiſe his child, or a maſter his ſervant, being (*c*) actually in his ſervice at the time; or a ſchoolmaſter (*d*) his ſcholar or a jailer (*e*) his priſoner, or even a husband (*f*) his wife, as ſome ſay; or if one confine (*g*) a friend who is mad, and bind

(*a*) 2 Ed. 4. 6. 21 H. 7. 39. (*b*) Dalt. ca. 72. Crom. 136. b. 38. H. 6. 25. 1 Sid. 176, 177. (*d*) H. P. C. 31. 1 Sid. 177. 21 Ed. 6. (*e*) Dal. ca. 72. (*f*) Crom. 28. b. 136. b. F. N. B. 80. F. Hedley 149. *Contra* 1 Sid. 113, 116. (*g*) 22 Aſs. 56. 2 R. A. 546. C.

and beat him in ſuch a manner as is proper in ſuch circumſtances; or, if a man force (*h*) a ſword from one who offers to kill another therewith; or if a man gently lay his hands on another, and thereby ſtays him from enticing a dog againſt a third perſon Q.? or, if I (*i*) beat one (without (*k*) wounding him, or throwing at him a dangerous weapon) who wrongfully endeavours with violence to diſpoſſeſs me of my lands or goods; or the goods of another delivered to me to be kept for him, and will not deſiſt upon my laying hands gently on him, and diſturbing him; or if a man beat, (*l*) or, as ſome ſay, wound, or maim one who makes an aſſault upon his perſon, or that of his wife, (*m*) parent, child, or maſter; eſpecially if it appear that he did all he could to avoid fighting before he gave the wound; or if a man (*n*) fight with or beat one who attempts to kill a ſtranger; or if a man even (*o*) threaten to kill one who puts him in fear of death in ſuch a place where he cannot ſafely fly from him; or if one (*p*) impriſon thoſe whom he ſees fighting, till the heat is over. See ASSAULT.

AWDY HOUSES. May upon indictment be ſuppreſſed, and the offenders puniſhed not only with fine and impriſonment, but alſo with other infamous puniſhment at the diſcretion of the court. 1 *Hawk. P. C.* 198. 225. The frequenting houſes of ill fame, is alſo an indictable offence. *Poph.* 208. See BARON and FEME and FAME.

EAST. See CATTLE.

ELLS. See CHURCHWARDEN.

GAMY. In the marrying two wives. See POLYGAMY.

ILLS OF EXCEPTIONS. It was formerly a common practice founded upon the ſtatute of *Weſt.* 2 when a judge in his directions or deciſions miſtaked the law by ignorance, inadvertency or deſign; for the counſel to require him to ſeal a *bill of exceptions*, ſtating the point in which he was ſuppoſed to err, which if he refuſed to do a compulſory writ was iſſued, to which if he made a falſe return, an action would lie againſt him: This bill was examinable in the next immediate ſuperior court, upon a writ of error after judgment

Ed. 4. 5. a. b. (*h*) Cro. Ja. 134. 2 R. A. 546. Pl. 35. 59. E. (*i*) 3. H. 4. 6. b. 9. a. Cro. Ja. 236. Yel. 172. Cro. Ca. 138. (*k*) 2 R. A. 546. Pl. 4. 8. (*l*) 41. Aſs. 21. 27. Ed. 3. 94. a. 25. Ed. 3. 42. a. 8 H. 8. a. b. 1 Sid. 246. Kelyn. 128. 1 Keb. 884, 921. 2 Inſt. 316. (*m*) Com. 136. b. Dal. ca. 72. (*n*) 12. H. 8. 2. b. (*o*) 32. H. 6. 18. b. 30. Ed. 4. 6. b. (*p*) 2 Roll. Abr. 559.

given

given in the court below: but theſe bills are now much diſuſed, and their place ſupplied by a *new triat* which is to be obtained by motion in the court.

BILLS OF EXCHANGE. A bill of exchange (or as it is ſometimes called a *draught*) is a ſecurity given by one man to another and is a requeſt from one man to another deſiring him to pay a ſum therein named to a third perſon. The perſon who forms and ſigns this is the *drawer*, the perſon to whom it is directed the *drawee*, and the negociator or him to whom it is payable the *payee*. Theſe bills are either *inland* or *foreign*, inland when the drawer and drawee reſide in England, foreign when one of thoſe live abroad.

It is no bill of exchange if the words *value received* are omitted. *Cunning. L. of B. of Exch.* 24. For without a conſideration appearing on the bill, it is but a bare power or authority to receive ſo much to the drawer's uſe.

Pay to me or my order 20l. is a bill of exchange if accepted: and this is the way to make a bill of exchange without the intervention of a third perſon. 1 *Salk.* 130, *Trin. Ann. B. R.*

As the drawing upon another man does not oblige the drawee to pay the money, ſo the proper method of binding him is by preſenting the bill for his acceptance, which if he intends duly to honor he will do, by ſubſcribing ſome word which amount to his aſſent to pay the bill: By the cuſtom of merchants the drawee may have 24 hours to conſider whether he will accept it or not. *Marius* 62.

And if a man makes a promiſe when it is preſented to accept or pay it, tho' he does not ſubſcribe the bill, it will effectually bind as if he had ſo done, if any one diſintereſted can prove it, and he can never revoke his acceptance. 3 *Abr.* 610.

The 3 and 4*th Anne c.* 9. requires acceptances to be in writing in order to charge the drawer with intereſt and coſts; having a proviſor that it ſhall not extend to charge any remedy that any perſon may have againſt the acceptor.

An indorſee if an inland bill of exchange may maintain an action againſt the acceptor, on a penal acceptance for the principal ſum, tho' not as to intereſts and coſts. 3 *Abr.* 611. And to charge the drawer with intereſt and coſts the drawee muſt refuſe to accept it *in writing*. *Idem.*

A bill may be accepted for part. *Cunning. L. Bill of*

37.

37. And when a bill is accepted to pay leſs then is mentioned in the bill, it is good for ſo much againſt the acceptor. *Idem.*

Acceptance of a bill upon two partners by one, binds both, if it concerns the joint trade. *Idem* 57. The acceptance of a ſervant uſually tranſacting buſineſs of this nature for his maſter is good. *Idem.* Yet a ſervant is liable if he accept *generally*, or without expreſſing it to be for his maſter. *Idem.*

A proteſt does not raiſe any debt, but only ſerves to give formal notice, that the bill is not accepted, or accepted and not paid, and without a proteſt the party loſes his intereſt and coſts againſt the drawer.

He to whom the bill is payable, muſt regularly reſort to the drawee, and deſire him to accept the bill, before there can be a proteſt; and if he be dead, or cannot be found, theſe are good cauſes for proteſting the bill; alſo, if after acceptance the drawee dies, there is to be a demand of his executors or adminiſtrators, and in default of payment a proteſt; and if the money becomes due before an executor or adminiſtrator can be appointed, yet this delay is ſufficient cauſe to proteſt the bill. *Molloy* 285.

But if the payee is dead, as none can give a legal diſcharge for the money but his executors or adminiſtrators, none can proteſt the bill, or ſue for or demand the money but them: and it is ſaid if a notary public proteſt the bill, an action on the caſe lays againſt him. *Idem.*

If a bill be left with a merchant to accept, which is loſt or miſlaid, he to whom it is payable, is to requeſt the merchant to give him a note for the payment, according to the time limited in the bill; otherwiſe there muſt be two proteſts, the one for non-acceptance, and the other for non-payment: and tho' ſuch note be given, yet, if the merchant happens to fail, there muſt be a proteſt for the non-payment in order to charge the drawer. *Idem* 281.

When a bill is caſually loſt and no new one can be had, and the party on whom it is drawn does not inſiſt on having the original bill, but refuſes payment for another reaſon, a proteſt made on a copy is ſufficient. 1 *Show.* 164.

The proteſt is made by a notary public, and ſuch proteſt is, *prima facie* good evidence that the bill was not accepted, or if accepted that it was not paid, and ſufficient to put the other ſide to the proof. *Molloy* 281. *Skin.* 272.

Beyond

Beyond the ſeas the proteſt (for *non-payment)* under the notary's hand is ſufficient to ſhew in court, without producing the very bill itſelf. But if a bill in England be accepted, and a ſpecial action grounded on the cuſtom be brought againſt the acceptor, at the trial the party plaintiff muſt produce the bill accepted, and not the proteſt, otherwiſe he will fail in his action at that time. Therefore it is ſafe that a bill once accepted be kept, and only a proteſt for non-payment be remitted: but a bill proteſted for non-acceptance muſt be remitted. *Molloy*, *B.* 2. *c.* 10. *ſ.* 25.

A proteſt on a *foreign* bill of exchange, is abſolutely neceſſary to entitle the party to recover againſt the drawer, not only intereſt and coſts, but likewiſe the principal ſum; and for this purpoſe the bill muſt be preſented in a reaſonable time; and in caſe of refuſal of acceptance, or in caſe the drawer cannot be found, it muſt be proteſted in a reaſonable time, and notice of ſuch proteſt as alſo notice of a proteſt after acceptance and non-payment muſt be given to the drawer in a reaſonable time; for though the drawer is bound to the party to whom the bill is payable, 'till payment be actually made; yet it is with this condition that proteſt be made in due time, and a lawful and ingenuous diligence uſed for the obtaining payment of the money; and the reaſon of this is, that the drawer might have had effects, or other means of his upon whom he drew, to reimburſe himſelf the bill, which ſince, for want of timely notice, he hath remitted or loſt; and in this caſe it is unreaſonable that the drawer ſhould ſuffer through his neglect; but as to the exact time herein, the law hath not determined it, but it is left to a jury to determine according to the cuſtom of merchants. *Molloy* 284. 1 *Vent.* 45. *Skin.* 411.

If therefore any damages accrue to the drawer for want of ſuch notice, it muſt be born by the perſon to whom the bill is payable; but this alſo muſt be left to a jury, who are to determine herein, according to the circumſtances of the caſe and the cuſtom of merchants. 6 *Mod.* 80, 81. 1 *Salk.* 131. *Comb.* 384. *Carth.* 510. 1 *Show.* 318.

The cuſtom of merchants is, that if the drawee abſconds before the day of payment, the perſon to whom it is payable may proteſt it, to have better ſecurity for the payment and to give notice to the drawer of the abſconding, and

after time of payment is incurred, that it ought to be proteſted for non-payment, or after it. But no proteſt *for non-payment* can be before the day whereon it is payable. *Trin.* 6. *W. & M.* And the uſual cuſtom in this caſe is, that the drawer or indorſer having received the value, muſt procure an able man, ſome friend of his who will for his honor underwrite the proteſt, which is common for non-acceptance, or for want of better ſecurity, uſing theſe or ſimilar words. *I, here underwritten do bind myſelf as principal, according to the cuſtom of merchants, for the ſum of money mentioned in the Bill of Exchange upon which this proteſt is made, dated, &c. Marius* 117.

If a bill be drawn on J. S. and he refuſes to accept it, or if he be out of town, and has left no orders or authority to accept bills; and A. B. will accept the bill for the drawer's honour: in either of theſe caſes, the payee or his aſſigns, ought in the firſt place to cauſe proteſt to be made for non-acceptance by J. S. and then he may take the acceptance of A. B. for the honour of the drawer; for otherwiſe the drawer may alledge that he did not draw the bill on A. B. but on J. S. and therefore, according to the cuſtom of merchants, diligence ought to be firſt uſed towards J. S. and by proteſt to prove his want of acceptance. *Marius* 88.

If a merchant, who has accepted a bill of exchange, ſhall become inſolvent, or be publickly reported to be failed in his credit, and that he abſents himſelf from the Exchange before the accepted bill be due: you muſt immediately on ſuch report cauſe demand for better ſecurity to be made by a notary. And in default thereof, cauſe proteſt to be made for want of better ſecurity, and ſend away that proteſt by the next poſt, that your friend may procure ſecurity from the party who drew the bill. *Ibid.* 111.

Merchants generally allow three days of grace after a bill becomes due for the payment, and for non-payment within three days, proteſt is made, but is not ſent away 'till the next poſt after the time of payment is expired, and if Saturday be the 3d day, no proteſt is made 'till Monday. *Molloy* 284.

Intereſt upon a bill of exchange commences from the demand made; and therefore if there was no demand made 'till the action is brought, the defendant may plead tender and refuſal, and that he is ſtill ready, &c. and ſo diſcharge himſelf of intereſt; but if it be the defendant's fault, that demand could not be made, as if he were out

of the kingdom or the like, in ſuch caſe want of demand ought not to prejudice the plaintiff. 6 *Mod.* 136, 138.

An indorſement is a transfer of the property of the bill to the indorſee, and is uſually done by ſigning the indorſor's name on the back. *Molloy* 281. *Faveſt.* 86. 87.

A bill payable or indorſed—*to the order of J. S.* will bear an action by the indorſee though the indorſement is not made to him, and he muſt aver that he made no order. 1 *Salk.* 130. *Carth.* 403. *Comb.* 401.

Bills payable to J. S. or *bearer*, are not aſſignable by the contract, ſo as to enable the indorſee to bring an action, if the drawer refuſe to pay, for the effect of it is only to diſcharge the drawee if he pays it to the bearer, though he comes to it by trover, theft or otherwiſe: but when the bill is payable to J. S. *or order*, there an expreſs power is given to the party to aſſign, and the indorſee may maintain an action. 1 *Salk.* 125, 133. 3 *Lev.* 299. *Skin.* 343. *Comb.* 204, 466.

But the indorſement of a bill payable to J. S. or bearer is good againſt the indorſor, who is liable to an action for the money. 1 *Salk.* 125. 133. *Skin.* 343. 411. And it hath been adjudged, even that the indorſee may maintain an action againſt the drawer; on alledging a ſpecial cuſtom, that ſuch bill ſhould bind him; which cuſtom is ſo proved or confeſſed by the defendant. 1 *Salk.* 125. 2 *Lev.* 299.

If a bill, payable to A. be indorſed to B. and by him indorſed to C. be proteſted for non-payment; B. notwithſtanding his indorſement may bring an action on the bill. 1 *Show.* 163.

A bill of exchange or promiſſory note cannot be indorſed over for part, ſo as to ſubject the party to ſeveral actions. *Carth.* 466. 1 *Salk.* 65.

Who ſhall be liable to the Payment.

If ſeveral perſons draw a bill they are all liable to pay the money. *Molloy* 278. As is every acceptor and indorſor; alſo if there are ſeveral indorſors of the ſame bill, the laſt indorſee may bring his action againſt the firſt indorſor, or any of them, for it is a warranty by the indorſor that the bill ſhall be paid. *Skin.* 343. *Ld. Raym.* 181. *Stra.* 479. So if a bill be drawn upon A. and he accepts it, and afterwards refuſes payment, upon which the bill is proteſted, the perſon to whom it is payable may bring ſeveral

ſeveral actions againſt the acceptor and the drawer; for the proteſt is no diſcharge of the acceptor. *Molloy* 273.

But though the drawer, acceptor and indorſer, are all liable, yet the party can have but one *ſatisfaction*; and yet until ſuch ſatisfaction is actually had, he may ſue all, or any of them. 3 *Mod.* 86. 1 *Lutw.* 880, 882. *Skin.* 255. *Co.* 4, 32.

The payee has alſo his remedy againſt him who *underwrites* a bill, *(vide ſupra)* as *ſurety*, as well as againſt the *principal*, but the principal or original drawer is liable o him who ſo ſubſcribes for his honour. *Molloy* 281, 285.

Where an indorſee gives time to the acceptor after the bill is due, if after the bill is due the acceptor fails, and there was no notice of non-payment to the drawer, it ſhall be the loſs of the indorſee. *Stra.* 792.

And if the indorſee does not demand the money payable by the bill, of the perſon on whom it is drawn, in a convenient time, and he fails afterwards, the indorſer is not liable. 12. *Mod.* 244, 11 *W.* 3.

As the drawee is the principal debtor, the drawer is liable only in default of the drawee, and if due diligence be not uſed to get the money from the acceptor or drawee, and a notice of his non-payment given in convenient time to the drawer, the drawer ſhall not be liable; for if it ſhould be otherwiſe, and the *perſon* upon whom the bill was drawn ſhould become inſolvent, without ſuch due diligence uſed by the payee, to demand payment from the drawee, or without his giving the drawer timely notice of the non-payment, then would the drawer unreaſonably ſuffer through the laches of the payee; having no intimation to call in his effects before the drawee became inſolvent. *Michaelmas*, 1758.

Who ſhall be entitled to the Money.

The money is to be paid to him in whoſe favour the bill is drawn, or if it be indorſed, to the laſt indorſee. *Carth.* 130. Or if a bill is made payable to A. who indorſes it to B. who indorſes it to C. which is proteſted for non-payment; B. may bring an action on this bill notwithſtanding the indorſement. 1 *Show.* 163.

Bills at ſight, are to be paid when preſented. Where the parties live at a great diſtance, in caſe bills ſhould be loſt by the way, it is proper to draw two or more bills for

the ſame money, and either of theſe being paid the other remains void and of no effect; but ſuch quality of the bill whether the 1ſt, 2d, &c. ſhould be particularly ſpecified. And no perſon ſhould take a firſt bill of exchange without a ſecond with it, unleſs it be accepted, and then the ſecond is needleſs.

BILL. A bill is a writing, wherein one man is bound to another to pay a ſum of money in the manner therein ſpecified; and theſe are either penal or ſingle. And upon this inſtrument an action of debt lies.

If a man enters into a bill obligatory to pay 20l. in manner following: i. e. 10l. at one day, and 10l. at another, an action of debt does not lie 'till after the laſt day; but if to pay 10l. at one day, and 10l. at another day: debt lies after the firſt day; becauſe in itſelf a ſeveral duty. *Owen* 42. So if a man makes a bill to B, for the payment of 20l. viz. 10l. &c. and thereby covenants and grants with B, that if he makes default in either of the ſaid payments, that he will pay what of the whole ſhall be unpaid after default at the firſt day, debt lies for the whole. 1 *Leon* 208.

BIRD. See CATTLE.

BLOOD, *corruption of.* This is a conſequence of an attainder, and it operates ſo that an attainted perſon can neither inherit lands, &c. from his anceſtors, nor keep thoſe he is already poſſeſſed of, nor tranſmit them by deſcent to any heir, and the perſon attainted ſhall alſo obſtruct all deſcents to his poſterity, wherever they are obliged to derive a title *through* him to a remoter anceſtor. *Co. Lit.* 391.

BLOOD, *whole and half.* My kinſman of the whole blood is one, that is derived not only from the ſame anceſtor as I am, but from the ſame couple of anceſtors; thus my brother of the *whole blood* is he who has the ſame father and mother with myſelf; but if he is derived from the ſame mother or ſame father only, and not from them both, we are brethren of the *half blood* only; and can never be heirs to each other as ſuch.

BOAT. See LAND.

BOND. An obligation or bond, is a deed by which the obligor obliges himſelf, his heirs, executors and adminiſtrators to pay a certain ſum at a day appointed. If this be all, the bond is a *ſingle one*; but there is generally a condition added, that if the obligor does ſome particular act, or pays a particular ſum, the bond ſhall be void: and if the

the condition be not performed the bond becomes abſolute, and charges the obligor while living: and after his death the obligation deſcends upon his heir, who is bound to diſcharge it if he has real aſſets by deſcent, if there is not a ſufficiency of perſonalty for that purpoſe.

Where one who has bound himſelf to another to pay a certain ſum of money, neglects or refuſes to pay the ſame at the day appointed, an action of debt lies againſt him. And here let it be obſerved, that if there be no time limited in a bond for payment of the money, the natural ſuggeſtion, and therefore the conſideration in law is, that it is due preſently, and payable on demand, that is, in convenient time, if the act is *tranſitory* or not tied to a certain place. 6 *Rep.* 30. 1 *Roll. Abr.* 437. *Co. Lit.* 208. *Poph.* 198. *Cro. Eliz.* 798. 1 *Brown.* 53. 1 *Inſt.* 208. *a.* But the judges have ſometimes appointed a convenient time for payment, having regard to the diſtance of time and place wherein the thing may be peformed. And if a condition be made impoſſible in reſpect of time, as, if payment is to be made on the 30th of February, it ſhall he paid preſently, and in ſuch caſe the obligation ſhall ſtand ſingle. *Latch.* 117. *Cro. Car.* 78. *Jones* 140. But if it be to pay on the 29th February following, and that month has but 28 days, it was held he was not bound to pay it till the 29th of February in the next leap year. 1 *Leon.* 101. But if the act to be done is *local*, i. e. to be done at a certain place, as at Rome, and the obligor is to do the ſole act without limitation of time, he has time during his life to perform it: yet if the concurrence of the obligor and obligee is requiſite, it may be haſtened by the requeſt of the obligee. 5 *Rep.* 30. 1 *Roll. Abr.* 437. Yet if the obligor may perform it in his abſence, the obligor has not time during his life. If no place be mentioned for payment, the obligor, if the obligee is in England, muſt at his peril find him out: but where a place is appoinied he need ſeek no further. 1 *Inſt.* 210. *Lit.* 340. And if when no place is mentioned for payment of the money, the obligor at or after the day of payment meets with the obligee and tenders him the money, but he goes away to prevent it, the obligor ſhall be excuſed. 8. *Ed.* 4.

The obligor or his ſervant, &c. may tender the obligee the money to ſave the forfeiture of the bond, and it ſhall

be a good performance of the condition; but if the obligor be afterwards ſued he muſt plead that he is ſtill ready to pay it, and tender the money into court. *Co. Lit.* 208.

If a woman through threats, flattery, &c. be prevailed upon to enter into a bond, ſhe may be relieved in equity. 11 *Rep.* 53. But if a bond be made by feme-covert ſhe may plead her coverture, and conclude *non eſt factum*, her bond being void. 10 *Rep.* 119. Whereas, if a bond be ſealed by an infant, this not being void in itſelf, but voidable only, he ſhould plead ſpecially to it, and not *non eſt factum*. 5 *Rep.* 119. If a bond depends upon ſome other deed, and the deed become void, the bond is alſo void. It is a general rule, that conditions to do an unlawful act, or an act which is *malum in ſe*, are void *ab initio*; and agreeable to this principle, ſuch as tend to injure or abridge the liberties of the public are not good; ſo if a condition be to indemnify a perſon from a legal proſecution, or not to give evidence againſt a felon, it is againſt law and void, and in ſuch caſes the defendant ſhould plead the ſpecial matter. 1 *Lutw.* 667. And in like manner, if the condition be impoſſible, or if it be repugnant, inſenſible, or uncertain, the condition is void, and in ſome caſes the obligation alſo. 10 *Rep.* 120. But ſometimes the obligation may be ſingle to pay the money, notwithſtanding the impoſſibility or other defect of the condition. 2 *Mod.* 285.—And here the law makes a very equitable diſtinction, which is, that if at the time of entering into the bond the condition is poſſible, it is void if it afterwards becomes impoſſible by the act of God, the act of the law, or of the obligee; but if the condition of the bond, &c. is impoſſible at the time of making it, the condition is ſingle. If a condition is doubtful, it is always taken moſt favourably for the obligor, and againſt the obligee; yet, ſo as to make a reaſonable conſtruction, and as near as may be to the intention of the parties. *Dyer* 51.

If a bond be of 20 years ſtanding, and no demand be proved thereon, or good cauſe of ſo long forbearance ſhewn to the court, upon pleading *ſolvit ad diem* it ſhall be intended paid. *Mod. Ca.* 22.

If ſeveral days are mentioned for payment of ſeveral ſums of money on a bond, the obligation is not forfeited, nor can be ſued 'till the laſt day is paſt. *Co. Lit.* 47: *b.* 292. *b.* 3 *Co.* 22. *a.* 128. *b.* *Cro. Jac.* 505. *Cro. Car.* 241. But in ſome

ſome caſes the obligee may proſecute for the money due on the bond preſently, though it be not forfeited; and by ſpecial wording the condition the obligee may ſue for the penalty on the firſt default. 1 *Inſt.* 47. *b.* 292. *b.* 8 *Rep.* 153. For if a man binds himſelf to pay J. S. 10l. at one day, and 10l. at another day, after the firſt day debt lies for 10l. becauſe it is in itſelf a ſeveral duty. *Owen* 42.

In a bond where ſeveral are bound ſeverally, the obligee is at his election to ſue all the obligors together, or all of them apart, and may have ſeveral judgments and executions; but he ſhall have ſatisfaction but once, for if ſatisfaction be made by one of them it ſhall diſcharge the reſt. But if an obligation be joint and not ſeveral, all the obligors are ſued that are bound; and if one be proſecuted, he is not obliged to anſwer, unleſs the others are ſued likewiſe. *Dyer* 19, 310. And on the other hand, if a bond is made to three to pay money to one of them, they muſt all join in the action, becauſe they are but as one obligee. *Yelv.* 177.

An heir is not bound unleſs he be named expreſsly in the bond; but executors and adminiſtrators are. 1 *Inſt.* 209. *a.* 2 *Inſt.* 598. 2 *Roll. Abr.* 149. *Noys Max.* 105. And if one bind his heirs only, and not himſelf, it is void, becauſe the anceſtor was not bound. *Litt.* 734. 1 *Inſt.* 386. *a.* And if an obligation be made to a man's heirs, or ſucceſſors, the executors and adminiſtrators, though not named, ſhall have the advantage of it, and not the heir or ſucceſſor, for it is a chattel, and the rule of law is that chattels go to the executor and adminiſtrator, and not to the heir. *Dyer* 14, 271. 2 *Inſt.* 8. *a.*

Upon a reverſal of a judgment recovered upon a bond a new action may be brought upon the bond. 6 *Rep.* 45, 46.

When the condition is to execute a replevin, the obligor is bound to do it without a tender. 1 *Mod.* 104.

Where by a condition a thing is to be performed upon demand, the obligor ſhall have a reaſonable time to perform this after demand. 15 *E.* 4, 30.

If one enters into an obligation, or contract, to pay money, &c. on two ſeveral contingencies, the obligor may have an action of debt when either of them happen; for this muſt be conſtrued to have been intended for the benefit of the obligee; and the rather, becauſe every contract is conſtrued moſt ſtrongly againſt the obligor: and in theſe

caſes the law ſupplies the words *which ſhould firſt happen.* 1 *Lev.* 54.

Though the bond or obligation is generally in double the ſum which is owing, &c. yet the Courts of Equity will not permit a man to take more than in conſcience he ought; namely, his principal, intereſt, and expences.

If a man forges a bond in my name, it is an injury, and I poſſibly may be damnified by it; but 'till it be put in ſuit againſt me, I cannot bring my action againſt the forger, for 'till then it is an *injuria ſine damno.* *Hob.* 267. 6 *Edw.* 4. 7. 2 *Bulſt.* 268. 6 *Mod.* 46.

If the obligor in a bond, without any new conſideration, as *forbearance, &c.* promiſes to pay the money, an action of aſſumpſit will not lie on the promiſe, but the obligee muſt ſtill purſue his remedy by action of debt. 1 *Roll. Abr.* 8. *Hutt.* 34. But *Cro. Eliz.* 240. ſeems contrary.

If an obligor takes away his bond from the obligee, he is liable to an action of treſpaſs *vi et armis.* 2 *Roll. Abr.* 557. See ACCEPTANCE and ACT.

BOOKS and PAPERS. The courts have not a compulſive power for the production of books and papers belonging to the parties as evidence in a cauſe; but when they are in the hands of a third perſon they can generally be obtained by rule of court, or by a *ſubpœna duces tecum.* See ACCOUNT-BOOKS and EVIDENCE.

BOTTOMRY. Is in the nature of a mortgage of a ſhip, when the owner takes up money to enable him to carry on his voyage, and pledges the *keel* or *bottom* of the ſhip *for the whole*, as a ſecuriry for the repayment; here if the ſhip be loſt, the lender loſes all his money; but if it returns in ſafety, then he ſhall receive back his principal, and alſo the premium or intereſt agreed upon, however it may exceed the legal rate of intereſt, and in this caſe the ſhip and tackle both, as well as the perſon of the borrower, are liable: but if the loan is not on the veſſel, but upon the goods, &c. then only the borrower perſonally is bound to anſwer the contract, who is then ſaid to take up money at *reſpondentia.* By the 19 *G.* 2. *c.* 37. all monies lent on bottomry, or at *reſpondentia*, on veſſels bound to or from the Eaſt-Indies, ſhall be expreſsly lent only upon the ſhip or upon the merchandize; the lender ſhall have the benefit of ſalvage; and if the borrower has not on board effects to the value of the ſum borrowed, he ſhall be reſponſible to the lender for ſo

much of the principal as hath not been laid out, with legal intereſt, and all other charges, though the ſhip and merchandize be totally loſt.

Breach of Covenant. See Covenant.

Brothels. See Bawdy-Houses.

Buggery. See Sodomy.

Bull. An action on the caſe lies againſt a perſon for keeping a mad bull, knowing him to be ſo, if any perſon is wounded by him. 1 *Lutw.* 90.

Burglary. Is the breaking and entering into a manſion-houſe, by *night*, with intent to commit a robbery; and it is burglary whether the intent was executed or not. And a burglary may be committed in a barn, ſtable, or warehouſe, if it be parcel of the manſion-houſe, though not under the ſame roof; but it is no burglary if it be in a diſtant barn, &c. 1 *Hal. P. C.* 558. 1 *Hawk. P. C.* 104. The puniſhment is death without clergy in the principal and acceſſary before; but the acceſſary after is allowed clergy, and receivers are to be tranſported for 14 years. 18 *Eliz. c.* 7. & 3 *W. c.* 9. & 10 *Geo.* 3. *c.* 48.

Burial-Charges. See Executors.

Burning. See Arson.

Burying. See Churchwardens.

C.

Carrier. If a man delivers goods to a common carrier to carry them to a certain place, if he loſes them an action upon the caſe lies againſt him; for by the common cuſtom of the realm he ought to carry them ſafely. 1 *Roll. Abr.* 2. *Hob.* 17. *Cro. Jac.* 262. So if they are damaged. *Palm.* 523. So if he be robbed of them. 1 *Roll. Abr.* 2, 124. 2 *Roll. Abr.* 367. 4 *Co.* 84. 2 *Sand.* 380. *Owen.* 57. *Hob.* 17, 18. *Cro. Jac.* 162, 330, 331. 1 *Bulſt.* 280. 1 *Sid.* 36. 1 *Mod.* 85. 2 *Ld. Raym.* 918. *Stra.* 128. 2 *Sand.* 380, *Palm.* 532. *Moor* 462. And though he be no common carrier, yet if he takes hire he may be charged upon his ſpecial aſſumpſit; for his undertaking makes him ſo. *Cro. Jac.* 262. 1 *Sid.* 245. 1 *Keb.* 8[illegible]2.

Yet if a carrier makes a ſpecial acc[illegible]tance he ſhall not be liable, and it is his buſineſs ſo to do *Allen* 93. 1 *Vent.* 238.

238. 1 *Keb.* 135. And becauſe carriers have been frequently obliged to anſwer for goods loſt, &c. where no ſpecial acceptance was made, it has introduced a cuſtom among them of late years to advertiſe that parcels, &c. of ſuch a value and nature, ſhall be entered and paid for as ſuch, and that unleſs they are ſo paid for and entered they will not anſwer for loſſes, &c. and the courts have favoured carriers in this reſpect; and it ſeems now the ſettled practice, that where this is the caſe, and the party ſending goods by ſuch advertiſing carrier knows that they have ſo advertiſed, the carrier ſhall not be liable; for it amounts to a ſpecial acceptance of them by him; but where the perſon ſending is not privy to the advertiſement the carrier ſhall be liable. From whence it appears that it is the ſafeſt way for carriers to make a ſpecial acceptance, as will alſo appear by the following caſes:

If A. delivers a box to a carrier to carry, and he aſks what is in it, and A. tells him a book and tobacco, whereas in truth there is 100l. beſides, yet if the carrier is robbed he ſhall anſwer for the money, for A. was not bound to tell him all the particulars in the box, and it was the buſineſs of the carrier to have made a ſpecial acceptance: ruled by *Roll*, at the *niſi prius at Guildhall*; but in regard of the intended cheat to the carrier, he told the jury they might conſider of it in damages; the jury however gave the plaintiff 97l. damages, abating only 3l. for carriage. *Aleyn* 93.

But if A. being a common carrier, receives two bags ſealed up, containing as he was told 200l. and gives a receipt to this effect: "Received of, &c. two bags of money "ſealed up, ſaid to contain 200l. which I promiſe to de"liver on ſuch a day at Exeter, to ——, he to pay 10s. "per cent. for carriage and riſk;" though the bags contain 450l. and the carrier is robbed, he ſhall be anſwerable only for 200l. for this is a particular undertaking; and as it is by reaſon of the reward that the carrier is liable, when the plaintiff endeavours to defraud him of it, it is but reaſonable he ſhould be barred of that remedy which is only founded on the reward. *Carth.* 485.

If a merchant lades goods aboard a ſhip, to be tranſported at a reaſonable reward of freight to be paid to the owners, and in the night time, while the ſhip rides in the Thames, notwithſtanding a competent number of men are

left on board for the guard of the ſhip and goods, yet ſeveral perſons, under pretence of impreſſing ſeamen, ſeize on the men aboard and take away the goods, an action will lie againſt the owners, and the owners pay the maſter; ſo that the money of the merchant is but handed over by them to the maſter: adjudged and ſaid, that though by the Admiral Law the maſter is not chargeable for a fatal damage, as in the caſe of pirates, ſtorm, &c. where there is no negligence in him; yet becauſe this ſhip was within the body of the county, this action muſt not be meaſured by the rules of that law. 1 *Vent.* 190, 233. 1 *Mod.* 85. 3 *Lev.* 259. *Holt Ch. J.* ſaid the maſter is chargeable in reſpect of his wages, and the proprietors in reſpect of the freight. *Molloy* 209, 210. And he muſt ſee forthcoming all that is delivered to him, let what will happen by fire, thieves, &c. the act of God or an enemy, perils and dangers of the ſea only excepted. The maſter is more particularly anſwerable for misfortunes which happen through the negligence, wilfulneſs, or ignorance of himſelf or his mariners.

Whenever a ſhip is in ſtreſs of weather, or in danger or juſt fear of enemies, and the maſter to ſave ſome part of the cargo throws ſome of the goods *of the leaſt value* and greateſt weight overboard, thoſe which are ſaved muſt contribute in proportion; and this common calamity ſhall be equally borne by all the parties intereſted, which is called average: but if A. and ſeveral others, being on their paſſage in a ferry-boat, and a tempeſt ariſes, ſo that to preſerve their lives ſeveral of the goods are thrown overboard, and among the reſt a pack of goods of A. of great value, it has been held that the perſons injured by ſuch an act could have no action againſt the bargeman. 2 *Bulſt.* 280. 2 *Raym.* 918. *Stra.* 128. Yet it ſeems now to be ſettled, that in this caſe there ſhall be no average; but the ferryman muſt anſwer for the goods, becauſe for his hire he runs the riſk of the voyage. *Allen.* 93. 12 *Co.* 62.

N. B. A carrier by not delivering the goods, or by embezzling them, cannot be guilty of felony, but is liable to an action upon the caſe; yet if he opens a pack and takes out part of the goods, with an intent to ſteal that part, he is guilty of felony; for a poſſeſſion of part diſtinct from the whole was gained by wrong, and not delivered by the owner. 13 *E.* 4. 10. *Dalt.* 102. *Kelynge* 35. 1 *Roll. Abr.* 73. 1 *Hawk. P. C.* 90.

If

If a common carrier, who is offered his hire, and wh has convenience, refuſes to carry goods, he is liable to a action on the caſe, in the ſame manner as an innkeeper wh refuſes to entertain a gueſt. 2 *Show. Rep.* 327. An actio alſo lies if a common ferryman refuſes to carry paſſenger *Hard.* 163.

But if a porter puts the box of a paſſenger behind ſtage-coach, and the maſter, as ſoon as he knows of it ſays, that he is already full, and refuſes to take the charg of it, the maſter ſhall not be liable: ruled upon evidenc 2 *Show. Rep.* 128. For this is the ſame caſe with an ho who refuſes his gueſt, his houſe being full, and yet the par ſays he will ſhift, &c. for if he be robbed the hoſt is d charged. *Bendl.* 60. *pl.* 101. 1 *And.* 29. adjudged.

If A. brings an action upon the caſe againſt the maſ of a ſtage-coach, on the cuſtom of the realm, for a trun loſt by his negligence, &c. and on evidence it appears th the trunk was delivered to the ſervant who drove the coac who promiſed to take care of it, and that the trunk w loſt out of his poſſeſſion; the action does not lie againſt t maſter; for a ſtage-coachman is not within the cuſtom a carrier is, unleſs he take a diſtinct price for the carriage the goods as well as the perſon; and though money given to the driver, yet that is a gratuity, and cannot bri the maſter within the cuſtom; for no maſter is chargeab with the acts of his ſervant, but when they are in executi of the authority given him by his maſter, and then the of the ſervant is the act of the maſter. 1 *Salk.* 282.

But by the cuſtom and uſage of ſtage-coaches, every pa ſenger uſes to pay for the carriage of goods above ſuch weight; and in ſuch a caſe the coachman ſhall be charg for the loſs of goods beyond ſuch weight. *Comyn.* 25.

If a man delivers goods to a common hoyman, who i common carrier of goods, to carry them to a certain pla and pays him according to the cuſtom for the carriage them, and afterwards for default of good keeping they loſt; an action upon the caſe lies againſt him; for by common cuſtom of the realm he ought to have kept carried them ſafely. *Cro. Jac.* 330. *Hob.* 17. adjudge

When goods of value are put into a lighter to be con ed from the ſhip to the key, it is cuſtomary for the ma to ſend a competent number of men to look to the m chandize, ſo that if any of the goods are loſt or embezz

the master is answerable, and not the wharfinger; but if such goods are sent aboard a ship, the wharfinger at his peril is to take care and preserve them. *Molloy* 212. So if he does not pay him, or make any agreement; for the carrier may have his action on the case, and recover as much as he deserved. *Cro. Jac.* 263. 1 *Sid.* 36. *Bro. Action on the Case* 78. 2 *Show.* 81, 129.

If a man delivers goods to such common hoyman to carry to a place, and after delivers them, being of good value, to another to keep safely in the boat, and does not discharge the hoyman, and after they are lost through negligence, an action on the case lies against him. 1 *Roll. Abr.* 2. *Hob.* 17. *Cro. Jac.* 330.

If A. delivers goods at Y. to B. (who is a water-carrier between Hull and London) to carry them from Hull to London; though the agreement is to carry the goods from Hull to London, and no mention is made of the carriage to Hull, yet if the goods are lost B. shall answer for them; for upon his general receipt of them at York he is liable. 1 *Sid.* 36. See 1 *Roll. Abr.* 338. 2 *Show.* 129.

CASE. It is an acknowledged maxim, *that the law has provided a remedy for every wrong*, which has given rise to another equally obvious, *that want of right and want of remedy are the same:* for whenever an act of Parliament gives a right, the Common law gives a remedy, or action: hence the law is ready to administer help to every one; and a man cannot suffer an injury in his person, property, or reputation, but here he may find relief: and that he may do this with decorum and propriety, (for the law delights in these) there are established rules with respect to the method of obtaining redress according to the injury sustained: yet as it is impossible the law should have provided its *distinct* action for every several and distinct species of injury, seeing the methods of injuring and deceiving are so various, it has in one general provision secured to every man a special action suited to the peculiar circumstances of his case, which is therefore called an action *on the case:* and this action is usualy defined to be a writ, brought against a man for an offence done without force, *sed contra pacem.* And Sir H. Finch thus, Offences without force are trespasses upon the case. *Finch's Law* 185.

The nature of the action thus considered will lead us to this plain determination, that it can be no objection to this

this action that such a one was never had before: for it is a general remedy provided for particular wrongs, which the law could not foresee, and so have a particular remedy for them; no wrong (without force, but against the peace) can be sustained that is excluded from this, except it be included in any other particular and established action for particular wrongs.

The kinds of this action are therefore without end, being the torts or injuries on which it is founded are unlimited and undeterminable. They may however, subject to many subdivisions, be divided into actions on the case for WORDS, and actions on the case for DEEDS. See SLANDER.

As to actions on the case for *deeds*, they are said to be either from not doing what one ought to do, or for doing what one ought to do amiss; and for doing that which one ought not to do at all; and are accordingly divided into nonfeasance, misfeasance, and malfeasance.

Actions on the case will sometimes lie where a man has another remedy: as, if one slanders my title, whereby I am wrongfully disturbed in my possession, though I have a remedy against the trespasser, yet I may have an action on the case against him who caused the disturbance. *Allen*

If a person is guilty of dilapidation, and afterwards takes another benefice, by which his former becomes void, his successor may have an action on the case against him; though it has been objected that his proper remedy was in the Spiritual Court. 1 *Roll. Rep.* 125. *Carth.* 224.

If A. and his predecessors have used time out of mind to find a chaplain to sing divine service, and to perform sacrament and sacramentals in the chapel of B. within the manor of D. for B. his servants and family, and he neglects to find such a chaplain, B. may have an action on the case against him; but it is otherwise of a public chapel, for there the remedy must be had in the Spiritual Court. 1 *Roll. Abr.* 110.

If a copyholder in fee surrenders a messuage to the use of one for life, the remainder to another in fee, and the defender (the husband of the tenant for life) pulls down part of the messuage, he in remainder may waive his remedy by action of waste, and have action on the case against him. 3 *Lev.* 130. *Q.?*

If the servant of a merchant takes the goods of his master, which are come to a port of England, and [illegible]

them without paying duty, by which the goods are forfeited and ſeized by the King; though the maſter may have action of treſpaſs againſt the ſervant, yet he may have an action on the caſe againſt him. 1 *Roll. Abr.* 105. See FALSE RETURNS, CONTRACTS, MINISTERS of JUSTICE, HORSES, SCHOOL, MILL, PASTURE, BOND, and FINDING.

CATTLE. If a man takes my cattle, and drives them into the cloſe of J. S. for which I am ſubject to the action of J. S. I may have an action on the caſe againſt him. 1 *Roll. Abr.* 100. *Lane* 67.

If a ſtranger chaces the beaſt of J. N. out of the land in the poſſeſſion of J. S. an action of treſpaſs *vi & armis* lies. *Keilw.* 46. Yet it is lawful for J. S. to chace the beaſt of J. N. with a little dog, out of land in the poſſeſſion of J. S. for he has an election either to do this, or to diſtrain the beaſt as a pledge for the damage done. 4 *Rep.* 38. 2 *Roll. Abr.* 566. 1 *Jon.* 131. But even in that caſe, if he chaces him with a maſtiff dog, and any hurt is done thereby to the beaſt, an action of treſpaſs lies; for the chacing with ſuch a dog was unlawful. 1 *Freem.* 347. 4 *Rep.* 38. *Cro. Car.* 254.

If the dog of J. S. kills the beaſt of J. N. an action of treſpaſs does not lie, unleſs the beaſt was a ſheep; and J. S. knew that his dog had been accuſtomed to bite ſheep. *Dyer* 25.

If the ſheep of J. N. are mixed with the ſheep of J. S. and J. S. chaces them to the next convenient place for that purpoſe, in order to ſeparate them, an action does not lie; for as they could not have been eaſily ſeparated without it, the doing of this was lawful. *Bro. Treſ. pl.* 213.

It is in general true, that an action of treſpaſs *vi & armis* does not lie for the taking or killing of any beaſt, or bird, which is *wild by nature*, becauſe there is no property in either of theſe; but if any ſuch beaſt or bird has been reclaimed, ſuch an action does lie for the taking or killing of it, for there is a general property in ſuch an animal. *Bro. Detin. pl.* 44. *Bro. Treſp. pl.* 407.

And an action of treſpaſs will ſometimes lie for taking a beaſt or bird which is *wild by nature*, and has not been reclaimed: as if a hare or coney is taken or killed upon the land of J. S. this action lies, although ſuch land is not a warren, or ſuch beaſt has not been reclaimed; for J. S. has by reaſon of its being upon his land a local property therein.

therein. 11 *Mod.* 75. But if a hare or coney goes, or is driven out of the land of J. S. he cannot then maintain such an action, because the property, which was only a local one, is determined. 5 *Rep.* 104. *Cro. Car.* 554. If however J. S. immediately pursues a hare or coney which has been driven out of his land and killed by J. N. it is not lawful for J. N. to carry it away; for by the pursuit of J. S. the local property was continued. 11 *Mod.* 75. *Sal.* 55[illegible]

And an action lies for the conversion of a bird or beast which is valuable, on account of its being merchandize, as a monkey or parrot, although it be wild by nature, and has not been reclaimed. *Cro. Jac.* 262.

If the beast of J. S. has been illegally taken away by J. N. J. S. may justify the retaking of it, for J. N. was himself the first wrong doer. *Cro. Eliz.* 329.

And if the mare of J. S. which has been so illegally taken, afterwards has a foal, J. S. may justify retaking both the mare and the foal. *Bro. Tref.* 327.

But if the beast of J. S. has been seized for the King's use, it is not lawful for J. S. even before office found, to retake it, for by this seizure his property was divested. *Ibid.* 357.

An action of trespass lies for the taking of a beast, although it is afterwards retaken by, or restored to the owner; but it is reasonable that such retaking or restoring should go in mitigation of damages. *Ibid.* 221. 2 *Roll. Abr.* 569. See Land and Dog.

Caution. See Battery.

Certificate of Bankrupt. If a bankrupt makes a clear and honest discovery of his effects, and conforms to the directions of the law, the creditors, or four parts in five of them in number and value, (but none creditors for less than 20l.) usually sign a certificate of such his conduct which is authenticated by the commissioners under their hands and seals, and by them transmitted to the Chancellor, who on oath of the bankrupt, that such certificate was obtained without fraud, will allow the same, or disallow upon good cause shewn by any of his creditors. If it is allowed he becomes a clear man again. See Allowance.

Chalice. See Churchwarden.

Challenge to Fight. Persons challenging others to fight a duel, whether it be by word or letter, and the bearer of such challenge, are punishable (by indictment) with [illegible]

and impriſonment, according to the circumſtances of the offence. 1 *Hawk. P. C.* 135, 138. If this challenge ariſes on account of any money won at gaming, or if any aſſault or affray happen upon ſuch account, the offender ſhall forfeit all his goods to the crown, and ſuffer two years impriſonment. 9 *Ann. c.* 14.

CHAMPERTY, Is the unlawful maintenance of a ſuit in conſequence of ſome bargain to have part of the thing in diſpute, or ſome profit out of it if they prevail. By the ſtatute 33 *Edw.* 1. the offender is puniſhable with three years impriſonment, and fine at the King's pleaſure. See MAINTENANCE.

CHANCERY. The Court of Chancery is a court of equity, and is deſigned for the correction of the rigor of the law, and frequently provides a remedy where the Common Law has given none.

All commiſſions of bankruptcy, ideots, lunacy, &c. iſſue out of this court.

This court in its determinations proceeds by the rules of equity and conſcience, and abates the rigour of the Common Law, by conſidering its intention rather than its words. It gives relief for and againſt infants, notwithwithſtanding their minority; and for and againſt married women, notwithſtanding their coverture. All frauds and deceits, for which there is no redreſs at Common Law; all accidents, as, to relieve obligors, mortgagors, &c. againſt penalties and forfeitures, are here remedied. This court will alſo give relief againſt the extremity of unreaſonable engagements, entered into without conſideration; oblige creditors that are unreaſonable to compound with an unfortunate debtor; make executors, &c. give ſecurity, and pay intereſt for money that is to lie long in their hands; order the performance of a will; confirm title to lands where the writings are loſt; render conveyances, which are defective through fraud or miſtake, good and perfect; ſupply the legal defects of powers reſerved; decree the payment of money where the ſecurity is loſt or deſtroyed; force men to come to account with each other, &c. and in ſuch and the like caſes, the matter being heard upon a bill and anſwer, and the proofs of witneſſes being read, the court will proceed to a ſentence according to equity. *Curs. Canc.* 6. 4 *Inſt.* 82. 1 *Chan. Ca.* 35, 104, 241. *N. Chan. Ca.* 295, 336. 2 *Chan. Ca.* 30.

CHEAT. If a perſon cheats me by playing with falſe cards or dice, or by falſe weights and meaſures, an action on the caſe lies againſt him for damages upon the implied contract that their tranſactions ſhould be honeſt. And perſons are puniſhable for cauſing an illiterate perſon to execute a deed to his prejudice, by reading it over to him in different words from thoſe in which it is written. 1 *Hawk. P. C.* 188.

And it ſeems to be the better opinion, that the deceitful receiving of money from one man to another's uſe, upon a falſe pretence of ſhewing a meſſage and order to that purpoſe, is not puniſhable at the Common Law by a criminal proſecution, becauſe it depends upon a naked lie, unaccompanied with any other artful contrivance. *Ibid.*

If a miller changes corn delivered to him to be ground, and gives bad corn inſtead of it, he may be indicted for it, becauſe, being a cheat in the way of trade, it concerned the public. *T.* 16. *G.* 2. *Seſſ. C. V.* 1. 217. Or an action on the caſe may be had againſt him.

If a perſon gets money from ſoldiers under a colour of a pretended power to diſcharge them, he may be indicted. *T.* 3. *C.* 1 *Latch.* 202.

If a minor, pretending to be of age, defrauds many perſons by taking credit for conſiderable quantities of goods, and then inſiſts on his non-age, the perſons injured cannot recover the value of their goods, but they may indict and puniſh him as a common cheat. *Barl.* 100.

The beſt criterion as to cheats which may be puniſhed *criminally*, is to be found in the caſe of the King and Wheatley, *H.* 1. *G.* 3. where the defendant was indicted and convicted for ſelling beer ſhort of the due and juſt meaſure, to wit, 16 gallons for 18, and a motion being made in arreſt of judgment: It was determined by the court, that this is only an injury to a private perſon, ariſing from his own negligence in not meaſuring the liquor. Offences that are indictable muſt be ſuch as affect the public; as, if a man uſes falſe weights and meaſures, and ſells by them to all or many of his cuſtomers, or uſes them in the general courſe of his dealings; ſo, if there is a conſpiracy to cheat: for theſe are deceptions that common care and prudence cannot guard againſt: theſe are much more than private injuries; they are public offences. But in the preſent caſe it is a mere private impoſition, or deception. No falſe

weights or meaſures are uſed; no conſpiracy; only an impoſition upon the perſon he was dealing with, in delivering him a leſs quantity inſtead of a greater, which the other careleſsly accepted. It is only a non-performance of his contract, for which he may bring his action. So the ſelling an unſound horſe for a ſound one is not indictable; the buyer ought to be more upon his guard. In a word, the general criterion was laid down to be this, that in ſuch impoſitions or deceits where common prudence may guard againſt perſons ſuffering from them, the offence is not indictable, but the party is left to his civil remedy; but where falſe weights and meaſures are uſed, or falſe tokens produced, or ſuch methods taken to cheat and deceive as people cannot by any ordinary care or prudence be guarded againſt, there it is an offence indictable. *Burrow.* 1125. See FAME and SALE.

CHILD. If a man entices a child away, an action on the caſe lies againſt him at the ſuit of the parent. See BATTERY.

CHURCH. See CHURCHWARDENS and PREACHING.

CHURCH-SEATS. See CHURCHWARDEN.

CHURCH-YARD. See the ſame.

CHURCHWARDENS. Churchwardens are choſen by a ſelect veſtry. 1 *Jones* 489. *Cro. Car.* 551. Every Eaſter week. *Degg* 1. 183. and ſworn by the archdeacon, againſt whom if he refuſes, a *mandamus* lies. 6 *Mod.* 89. and if he make a falſe return an action on the caſe. 2 *Lutw.* 1012.

By the 1 *W. & M. c.* 18. If any diſſenting from the church be choſen, he may execute the office by a ſufficient deputy.

The churchwardens, when choſen, are a corporation, intruſted with the care of the churches goods, and are enabled to take goods for the benefit of the church, but cannot diſpoſe of them without the pariſhioners conſent. 1 *Roll. Abr.* 393. 2 *Inſt.* 492. *Comp. Incumb.* 390. But they cannot take lands. *Kelw.* 32. *a.* 1 *Salk.* 167.

They may bring actions for taking away or damaging the *organ.* 1 *Roll. Abr.* 392. *Bells, Cro. Eliz.* 145. 179. *Pariſh books.* 5 *Mod.* 395, 396. *Bible, Chalice, Surplice,* &c. 1 *Roll. Rep.* 67. belonging to the church, and the parſon cannot ſue for them in the ſpiritual court. 1 *Roll. Abr.* 392.

They may alſo bring an appeal of robbery for things ſtolen. 2 *Hawk. P. C.* 167. And may ſue the offender in

the ſpiritual court *pro ſalute animæ*, but not to recover damages. 1 *Sid.* 281. *Regiſt.* 57.

But the churchwardens have no right to, or intereſt in, the freehold and inheritance of the church which alone belongs to the parſon or incumbent. *Comp. Incumb.* 381. And therefore they cannot grant a licence for burying *in the church*. *Cro. Jac.* 366. And if the walls, windows, or doors of the church be broken, or the trees in the church-yard cut down, or the graſs eaten by a ſtranger, the incumbent ſhall have his action. *Bro. Treſpaſs* 210. And ſo may his leſſee, if it be let. 2 *Rol. Abr.* 337.

The churchwardens cannot alone diſpoſe of ſeats in the church they being fixed to the freehold, except by cuſtom as in London. *Comp. Incumb.* 382, 387, 383. 1 *Salk.* 167. 2 *Roll. Abr.* 288.

But the churchwardens, and not the parſon, ſhall have an action againſt thoſe who take them away. *Comp. Incumb.* 382. And it is ſaid, that at common law a churchwarden may maintain an action on the caſe for defacing a monument in the church. *Godb.* 279. And if churchwardens, or any others take down arms in the windows, or deface grave ſtones or monuments, an action lies by the heirs or executors of the parties for whom they were erected. 1 *Roll. Abr.* 625. *Noy* 104. *Godb.* 200.

The churchwardens have no power to make any rate themſelves, but muſt publicly in the church ſummon the pariſhioners, and when they are met a rate made by the majority ſhall bind the whole pariſh, altho' the churchwardens vote againſt it. *Comp. Incumb.* 389.

But if the pariſhioners refuſe to come, or being aſſembled refuſe to make any rate, they may make one without their concurrence, for as they may be puniſhed for not repairing the church, it is but reaſonable that this ſhould be the caſe. 1 *Vent.* 367. 1 *Mod.* 79, 194.

The churchwardens at the expiration of their year, are to give up their accounts to their pariſhioners, or a ſelect committee appointed by them, and on refuſal may be proceeded againſt in the eccleſiaſtical court, or the *ſucceeding churchwardens* may bring an action of account againſt them at common law. Churchwardens are comprehended within the purview of the 7 *Jac.* 1. and 21 *Jac.* 1. as to pleading the general iſſue to actions brought againſt them, and as to double coſts when they have judgment: but in an action

action on the caſe againſt them for a falſe and malicious preſentment, tho' there be judgment for them, yet they ſhall not have double coſts; for the ſtatute extends not to ſpiritual affairs. *Cro. Car.* 285.

CLERGY, *benefit of.* The benefit of the clergy and burning in the hand, reſtores the offender to his credit, coming in the place of purgation at common law. Our ſtatutes deny clergy in a great many felonies tho' it is allowed in all caſes, unleſs taken away by the expreſs words of an act of parliament. 2 *Hal. P. C.* 330. And when the benefit of clergy is taken away *from the offence*, a principal in the ſecond degree, aiding and abetting the crime is as well excluded from his clergy as he that is principal in the firſt degree: but, where it is only taken away *from the perſon committing the offence*, his aiders and abettors are not excluded. 1 *Hal. P. C.* 529. *Foſter* 356. See ACCESSARY.

CLERGY, *beating of.* If any perſon lay violent hands on a clergyman, he is ſubject to three kinds of proſecution, all of which may be purſued for one and the ſame offence: 1. An indictment, for the breach of the king's peace by ſuch aſſault and battery; 2. A civil action for the ſpecial damage ſuſtained by the party injured; and 3. A ſuit in the eccleſiaſtical court, firſt for the correction and health of the ſoul by *enjoining* penance, and then again for ſuch ſum of money as ſhall be agreed on for *taking off* the penance enjoined; it being uſual in thoſe courts to exchange their ſpiritual cenſures for a round compenſation in money; perhaps becauſe poverty is generally eſteemed by the moraliſts the beſt medicine for the ſalvation of the ſoul! 9 *Ed.* 2. *c.* 3. 4 *Black. Com.* 218.

CLIENT. See ATTORNEY and COUNSEL.

CLOATHS. By the 6 *G.* 1. *c.* 23. The wilful and malicious tearing, cutting, ſpoiling, burning or defacing of the garments or cloaths of any perſon paſſing in the ſtreets or highways, is felony. See TAYLOR.

CLOSE. See LAND.

COACH. See CARRIER.

CODICIL. When a man having made a will is deſirous of altering it, or of adding ſomething to it, it is uſually done on a ſeparate paper and annexed to the will to be taken as part thereof, and this is called a codicil, from the latin *codicillus*, a little book or writing. *Godolph. p.* 1. *c.* 1. *ſ.* 3.

COLLECTING *goods of the deceaſed.* See EXECUTOR.

COMBINATION. Combinations among victuallers or artificers, to raiſe the price of proviſions or other commodities, or the rate of labor, are in many caſes ſeverely puniſhed by particular ſtatutes; and in general by the 2 and 3 *Ed.* 6. *c.* 15. either the forfeiture of 10 l. or 20 days impriſonment, with an allowance of only bread and water, for the firſt offence; 20 l. or the pillory for the ſecond; and 40 l. for the third, or elſe the pillory, loſs of one ear, and perpetual infamy.

COMMISSION *of Bankrupt.* See BANKRUPT.

COMMITMENT. If a bankrupt abſconds, or is likely to run away, between the time the commiſſion is iſſued and the laſt day of the ſurrender, he may by warrant from the judge or juſtice of peace be apprehended and committed to the county goal. 2 *Black. Com.* 481.

Wherever a conſtable or private perſon may juſtify the arreſting another for felony or treaſon, he may alſo juſtify the committing him to the common goal. 2 *Hawk. P. C.* 116, 117. But it is by all means moſt adviſeable at this day for any private perſon who arreſts another for felony, to bring him before ſome juſtice of peace, that he may be committed or bailed by him. *Hal. P. C.* 91, 112.

A juſtice of the peace may detain a priſoner a reaſonable time, in order to examine him; and it is ſaid that three days is a reaſonable time for that purpoſe. 2 *Hawk. P. C.* 115. *Cro. Eliz.* 829. 830. See FALSE IMPRISONMENT.

COMMON. Tho' a commoner hath only a limited intereſt in the ſoil, yet he may diſtrain beaſts doing damage, or bring an action on the caſe, &c. but not being abſolute owner of the ſoil, he cannot bring a general action of treſpaſs for a treſpaſs done upon the common. 2 *Leon.* 201. 4 *Mod.* 187. *Vern.* 308. 3 *Will. Rep.* 257. Nor can he diſtrain or drive out the cattle of the lord or tertenant, doing damage; and if the lord ſurcharges the commoner, his proper remedy is an action on the caſe. *Yelv.* 104.

A commoner cannot cut down buſhes, fern, &c. for the improvement of the common. 1 *Sid.* 251. Nor in caſe of a flood make a trench in the ſoil. 1 *Roll. Abr.* 405. unleſs by ſpecial cuſtom. If the land be full of mole-hills, he may dig them down, for this is a reforming a thing abuſed, which he may do tho' he is a treſpaſſer if he makes any new thing. 1 *Brownl.* 228.

Every

Every commoner may break the common if it be incloſed. 1 *Roll. Abr.* 406. 2 *Mod.* 65, 66. And if the tenant of the freehold plough and ſow it with corn, the commoner may put in his cattle to eat the corn growing. 2 *Leon.* 202, 203. See LAND.

COMMON *Scold.* A common ſcold is a public nuſance to the neighbourhood: for which offence ſhe may be indicted. 6 *Mod.* 213. And when convicted may be plunged in the water in a cucking or ducking ſtool. 3 *Inſt.* 219.

COMPOSITION *with Creditors.* It is a very frequent practice where a debtor (who is in deſperate circumſtances) together with his creditors are deſirous of ſaving the expence, &c. of a commiſſion of bankruptcy, to compound for his debts by granting an aſſignment of all his effects to certain truſtees, who are empowered to make an adequate dividend to the ſeveral creditors, executing the deed of truſt.

COMPOUNDING *Felonies.* Is where the party robbed not only knows the felon, but alſo takes his goods again, or other amends, upon agreement not to proſecute: this is puniſhed with fine and impriſonment. 1 *Hawk. P. C.* 125. By the 25. *Geo.* 2. *c.* 36. if any one even advertiſes a reward for the return of things ſtolen, with no queſtions aſked, or words to that purport, the advertiſer and printer are liable to a forfeiture of 50 l. each.

COMPOUNDING *informations.* By the ſtat. 18. *Eliz. c* 5. if any perſon, informing under pretence of any penal law, makes any compoſition without leave of the court, or takes any money or promiſe for the defendant to excuſe him, he ſhall forfeit 10 l. ſhall ſtand in the pillory two hours, and ſhall be for ever diſabled to ſue on any popular or penal ſtatute.

COMPULSION. It is looked upon as excuſable by our laws where vicious acts are done through unavoidable force or compulſion; and here nothing but the matrimonial ſubjection of the wife to the huſband will excuſe: for neither a ſon or a ſervant are excuſed for the commiſſion of any crime whatever by the command or coercion of the parent or maſter. 1 *Hawk. P. C.* 3. Though in ſome caſes the command or authority of the huſband, either expreſs or implied, will privilege the wife from puniſhment even for capital offences. And therefore if a woman commit theft, burglary, or other civil offences againſt the laws of ſociety, by the coercion of her huſband, or merely by his command, which the law

conſtrues a coercion; or even in his company, his example being equivalent to a command; ſhe is not guilty of any crime; being conſidered as acting by compulſion and not of her own will. 1 *Hal. P. C.* 45. See BAWDY HOUSE and THREATS.

CONDITION. See ACT and BOND.

CONFESSION *of Action.* When an action is brought againſt a perſon, and the party pays part and deſires time to pay the remainder, or has time given him to pay the whole, it is the moſt ſecure and effectual method for the plaintiff to inſiſt on a *cognovit* from the defendant, which is a little writing drawn up and ſigned by the defendant in the preſence of a ſubſcribing witneſs, wherein the defendant confeſſes the action, and acknowledges that the plaintiff hath ſuſtained damages to ſuch a ſum, and conſents that judgment may be entered up for the ſame with coſts of ſuit to be taxed, ſo that execution be ſtayed till ſuch a day, and that the ſheriff ſhall levy the coſts of execution with his poundage and officers fees, and that he will bring no writ of error in that cauſe. N. B. An attorney muſt be preſent on the defendant's behalf, and it is uſual for him to be the ſubſcribing witneſs.

CONJURATION. By the 9 *Geo.* 2. *c.* 5. no proſecution ſhall be carried on for conjuration, witchcraft, ſorcery, or inchantment. But perſons pretending to uſe witchcraft, tell fortunes, or diſcover ſtolen goods by ſkill in hidden ſciences, are puniſhable with a year's impriſonment, and ſtanding four times in the pillory.

CONSANGUINITY. See DESCENTS.

CONSIDERATION. As to the conſideration of *contracts*, that which is the price or motive of a *contract* is called the conſideration; A good conſideration is ſuch as blood or natural affection, but theſe conſiderations may ſometimes be ſet aſide, and the contract be made void, as when it manifeſtly tends in its conſequences to defraud creditors, &c. But a *valuable conſideration*, as for marriage, for money, for work done, &c. can never be impeached in law, and if it be of a ſufficient adequate value, is never ſet aſide in equity. 2 *Black. Com.* 444.

A conſideration of ſome ſort is abſolutely neceſſary for the forming of a contract, for a *naked* promiſe or agreement to do or pay any thing on one ſide, without any compenſation on the other, is totally void in law, and a man cannot be

be compelled to perform it. *Dr. and Stud. d. 2. c.* 24. And as this rule was introduced chiefly to avoid the inconvenience of mere verbal promiſes, if a man enters into a voluntary bond or gives a promiſſory note, he ſhall not be allowed to aver the want of a conſideration in order to evade the payment; and courts of juſtice will ſupport them both as againſt the contractor himſelf; but not to the prejudice of creditors or ſtrangers to the contract. *Ibid.* 446.

As to *deeds*, ſuch as are made upon good conſideration only, are conſidered as merely voluntary, and are frequently ſet aſide in favour of creditors. And a deed or other grant without any conſideration, is as it were of no effect, for it is conſtrued to enure, or to be effectual only to the uſe of the grantor himſelf. *Perk. ſ.* 533.

Deeds muſt not be founded upon uſurious contracts. *ſtat.* 13 *Eliz. c.* 8. Nor upon fraud or colluſion, either to deceive *bona fide* purchaſers, or juſt and lawful creditors. 13 *Eliz. c.* 5. For any of theſe conſiderations will make the deed void. See GIFT and CASE.

CONSPIRACY. Conſpiracy is where two or more prefer malicious indictments or proſecutions againſt another, and for this the law has given a very adequate remedy in damages, either by an action of *conſpiracy*, (which cannot be brought but againſt two at the leaſt;) or which is the more uſual way, by a ſpecial action on the caſe for a falſe and malicious proſecution. In order to carry on the former (which gives a recompence for the danger to which the party has been expoſed) it is neceſſary that the plaintiff ſhould obtain a copy of the record of his indictment and acquittal; but, in proſecutions for felony, it is uſual to deny a copy of the indictment, where there is any the leaſt probable cauſe to found ſuch proſecution upon. *Finch. L.* 305. *F. N. B.* 116. *Carth.* 421. *Lord Raym.* 253. 3 *Black. Com.* 126. But an action for a malicious proſecution may be founded on ſuch an indictment whereon no acquittal can be; as if it be rejected by the grand jury, &c. For it is not the danger of the plaintiff, but the ſcandal, vexation and expence, upon which this action is founded. 10 *Mod.* 219. *Stra.* 691. However, any probable cauſe for preferring it is ſufficient to juſtify the defendant. 3 *Bl. Com.* 127. See MALICIOUS Proſecutions.

CONSTABLE. A perſon duly elected conſtable refuſing to take upon him the office, may, if preſent, be fined by the court: and

and if abſent, on having a certain time and place appointed him to be ſworn before a juſtice, may after notice of ſuch appointment and preſentment at the next court be amerced. 5 *Mod.* 130. 8 *Co.* 38.

Alſo in either caſe he may be indicted, either before juſtices of *oyer & terminer*, or at the ſeſſions of the peace. 2 *Hawk. P. C.* 64. 2 *Stra.* 920.

Attornies and other officers attending on the courts at Weſtminſter Hall are exempted from ſerving the office of conſtable, and if choſen they may have a writ of privilege. *Noy* 112. 1 *Mod.* 22.

So are aldermen, ſurgeons, apothecaries, &c. And proſecutors of felons to conviction, or the perſon to whom he ſhall aſſign the certificate; alſo, perſons ſerving for themſelves in the militia, during ſuch ſervice. See ARREST, HOUSE, and FALSE IMPRISONMENT.

CONTRACT. Contracts are divided into contracts expreſs and implied. And where there are frauds in contracts, an action on the caſe will lie. See CONSIDERATION, GIFT and SALE.

CONVEYANCES. See AGREEMENTS.

COPARCENERS. If one ſeized of an eſtate of inheritance die leaving only *daughters*, *ſiſters*, *aunts*, or other females of kin in equal degree, and the eſtate deſcends to any of theſe they are ſaid to be held in coparcenary, and to make but one *heir* to their anceſtors. *Co. Lit.* 241. and have but one eſtate among them. *Co. Lit.* 163.

In this inheritance ſometimes the deſcent is in *capita*; as where a man hath iſſue two daughters, and dies, the deſcent is in *capita*; therefore each ſhall inherit alike; and ſometimes the deſcent is in *ſtirpes*, as if a man hath iſſue two daughters and dies, and the eldeſt daughter hath iſſue two daughters, and the youngeſt one daughter, all theſe four ſhall inherit, but the daughter of the youngeſt ſhall have as much as the other three. *Co. Lit.* 164. *b.* But if the eldeſt had iſſue ſeveral ſons and daughters, the eldeſt ſon only of ſuch daughter ſhould inherit his anceſtor: but all the daughters of the youngeſt, however many they might be, ſhould hold their mother's moiety in coparcenary with him. *Id.*

Parceners to recover poſſeſſion muſt join in the præcipe. *Co. Lit.* 164.

Coparceners may make partition of their eſtate: and where one coparcener will not agree to make partition

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luntarily, a writ *de partitione facienda*, lies for the other coparceners againſt him. *Co. Lit.* 167. *a.*

They may ſue and be ſued jointly. *Co. Lit.* 164. And the entry of one ſhall in ſome caſes enſure to the entry of them all. *Ib.* 188, 243. They cannot have an action of treſpaſs againſt each other; but herein they differ from joint-tenants, that they are alſo excluded from maintaining an action of waſte. 2 *Inſt.* 403. For copartners could always put a ſtop to any waſte by a writ of partition, but 'till the ſtat. *H.* 8. joint-tenants had no ſuch power. There are alſo other differences between joint-tenants and coparceners: as, 1. Parceners always claim by *deſcent*, joint-tenants always by *purchaſe*. Therefore if two ſiſters purchaſe lands to hold to them and their heirs, they are joint-tenants. *Lit. ſ.* 254. And hence it likewiſe follows, that no lands can be held in coparcenary, but eſtates of inheritance, which are of a deſcendible nature; whereas not only eſtates in fee and in tail, but for life or years, may be held in joint-tenancy. 2. There is no unity of *time* neceſſary to an eſtate in coparcenary, for if a man hath two daughters, to whom his eſtate deſcends in coparcenary, and one dies before the other, the ſurviving daughter is the heir of the other, or, when both dead, their two heirs are ſtill parceners. *Co. Lit.* 164, 174. 3. Parceners are properly intitled each to the whole of a diſtinct moiety, and of courſe there is no ſurvivorſhip among them, for each part deſcends ſeverally to their reſpective heirs.

COPYHOLD. Tho' copyholders are tenants at will, yet their eſtates ſhall deſcend to their heirs, and ſuch deſcent ſhall be governed by the rules of the common law. 4 *Co.* 22. *a.*

But it is not aſſets in the heirs hands; neither ſhall a woman have dower in it, nor a man be tenant by the curteſy, unleſs by ſpecial cuſtom; nor ſhall a deſcent take away an entry. 4 *Co.* 23. *a.* 30. *b.* 6 *Mod.* 64.

Every copyholder may take hedge-bote, houſe-bote, and plough-bote upon his copyhold, but this may be reſtrained by cuſtom. 13 *Co.* 68. 2 *Brownl.* 329.

A copyholder may diſpoſe of his lands, and bar the wife of her *free-bench*, unleſs there be a particular cuſtom that ſhe ſhall avoid any alienation, &c. *Cro. Jac.* 36.

If a copyholder in fee accepts a leaſe for years of the ſame land from the lord, this determines the copyhold eſtate. But if he takes a leaſe for years of the manor, this is only a ſuſpen-

a ſuſpenſion of his copyhold during the term. 2 *Co.* 16. *b.* *Cro. Jac.* 84.

If a copyholder releaſes to his lord, this is an extinguiſhment of his copyhold; ſo if the lord ſell the freehold of the inheritance of the copyhold to another, and then the copyholder releaſes to the purchaſer, this extinguiſhes the copyhold intereſt. 1 *Keb.* 808. 1 *Leon.* 102.

A copyholder cannot implead or be impleaded in real actions, or that concern the reality, any where but in the lord's court, for there being a court for that purpoſe, and the lord being the judge thereof, it is his duty and intereſt to determine the controverſies of his tenants, and therefore not cognizable at common law. *Co. Lit.* 60. *a.* *Moor* 68.

But actions merely perſonal, the copy-holder may ſue at common law. *Co. Copyh.* 143.

The lord of the manor may implead or be impleaded, and avow for the rent or ſervices of his copyholder in any court of Weſtminſter, otherwiſe he would be judge and party. 1 *Roll. Abr.* 374. 1 *Salk.* 186.

A leſſee of a copyholder for a year may maintain an ejectment, for the common law warrants his term, and therefore gives him remedy in caſe he is put out of his poſſeſſion; ſo may a leſſee by licence: alſo where by cuſtom a copyholder may make a leaſe, ſuch leſſee may maintain an ejectment. 4 *Co.* 26.

If the wife of a copyholder in fee, by ſpecial cuſtom, recovers dower by plaint in the court of the manor and 50*s.* damages, an action of debt will not lie at common law for the damages. 4 *Co.* 30. *b.* *Moor* 410.

CORONERS. They are ſo called, becauſe they deal principally with pleas of the crown, and were formerly the principal conſervators of the peace within their counties. 4. *Inſt.* 271. 2 *Inſt.* 31.

If a coroner be remiſs in coming to do his office when he is ſent for, &c. he ſhall be amerced by virtue of the ſtatute *de Coron.* *Salk.* 377. And if he returns a wrong preſentment an information will be granted againſt him. *Comb.* 386.

By the 3 *Ed.* 1. *c.* 9. coroners concealing felonies, not doing their duty thro' favor to the miſdoers, ſhall be impriſoned a year, and fined at the king's pleaſure.

Alſo by the 3 *H.* 7. *c.* 1. If a coroner be remiſs, and make not inquiſitions upon the view of the body ſlain or murdered, he ſhall forfeit for every default 100*s.* And

1 *H.* 8. *c.* 7. if any coroner ſhall not endeavor himſelf to do his office upon any perſon dead by miſadventure, he ſhall forfeit 40 s. And by 3. *H.* 7. *c.* 1. if any coroner do not certify his inquiſition, he ſhall forfeit 100 s.

By the 25*th G.* 2. *c.* 29. If any coroner not appointed by an annual election, or whoſe office is annexed to another office, ſhall be convicted of extorting more than his lawful fees, or of wilful neglect of his duty, or miſdemeanor in his office, the court may adjudge him to be amoved from his office.

And by the writ *de Coron. exoner*, he may be diſcharged if he be diſabled to execute his office. *F. N. B.* 163. *S. P. C.* 48. 8 *Co.* 41. 2 *Inſt.* 32.

CORPORATIONS. Corporations aggregate muſt ſue and defend by attorney; and therefore the proper proceſs againſt them is a *diſtringas*. *Co. Lit.* 66.

A corporation aggregate cannot diſtrain in their own perſons, but by their bailiff, and therefore no replevyn lies againſt them by the name of their corporation. 1 *Brownl.* 175. Nor can they be declared againſt as in the cuſtody of the marſhal. 6 *Mod.* 183. 2 *Ld. Raym.* 1532. And they cannot ſue as a common informer. 2 *Stra.* 1241.

Aggregate corporations conſiſting of a conſtant ſucceſſion of various perſons, can regularly do no act without writing; therefore gifts by and to them muſt be by deed. *Co. Lit.* 94. *b. Raym.* 194. And they are capable of purchaſing and parting with their poſſeſſions. 45 *E.* 3. 2, 3.

A corporation aggregate may take any chattel, as bonds, leaſes, &c. in its political capacity, which ſhall go in ſucceſſion, becauſe it is always in being. *Co. Lit.* 46. *b.* 1 *Roll. Abr.* 515. But *regularly*, no chattel ſhall go in ſucceſſion, in caſe of a ſole corporation. *Co. Lit.* 46. *b.* except this general rule be avoided by cuſtom. 4 *Co.* 65. *Cro. Eliz.* 464, 582.

If a leaſe for years be made to a biſhop and his ſucceſſors, and the biſhop dies, this ſhall not go to his ſucceſſors, but to his executors. *Co. Lit.* 46. *b.*

If a corporation aggregate diſſeiſe to the uſe of another, they are diſſeiſors in their natural capacity, and the perſons who committed the wrong ſhall be charged therewith: and if a mayor or other member of a corporation procure a falſe return to be made to a *mandamus*, they may be proceeded againſt in their private capacities. 1 *Salk.* 192.

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If lands are given to a corporation, which is afterwards dissolved, the donor shall have the lands again. *Co. Lit.* 13 *a.* 1 *Roll. Abr.* 816.

CORPSE. The parson who has the freehold of the soil in a church-yard, may bring an action of trespass against such as dig and disturb it: and if any one in taking up a dead body steals the shroud or other apparel, it will be felony, 3 *Inst.* 110. 12 *Rep.* 113. 1 *Hal. P. C.* 515. For the property thereof remains in the executor, or the person who was at the charge of the funeral. See GRAVESTONE.

COSTS. See the ADDENDA.

COTTAGES. By the 31 *Eliz. c.* 7. No cottage shall be erected without four acres of freehold land or inheritance, to be occupied therewith on pain of forfeiting 10 l. to the king and 40 s. per month during its continuance: and no owner or occupier of a cottage shall suffer any inmates therein, or more families than one to inhabit there, on pain to forfeit 10 s. per month to the lord of the leet. This rigid law is seldom or never put in execution.

COVENANT. Where two or more agree together *by deed in writing*, to do or not to do some act or thing, it is called a covenant; and where a man covenants to do a certain thing, &c. and neglects or refuses, an action *of covenant* lies for the breach.

Where a man covenants to pay a certain sum of money, and does not pay it on the day appointed, an *action of debt* lies.

Action of debt is a proper remedy which the law gives for the recovery of rents reserved upon leases for years; but now formerly extended not to freehold rents; but now by 8 *Ann. c.* 14. persons leaving any rent in arrear, or upon any lease or demise for life or lives may bring an action of debt for them in the same manner as they might have done in case such rent were reserved upon a lease for years.

Action of debt does not lie against an original lessee for covenant for payment of rent, after acceptance of rent from the assignee, but action of covenant does; yet where there is no acceptance it does, for the personal privity of contract remains, tho' the privity of estate is gone. 3 *Rep.* 22. but after the lessee's death it is then a real contract and runs with the land.

If one man covenants to pay another 20 l. at a certain day; tho' he may have action of *debt* for the 20 l. yet

ſaid he may have an action of *covenant* at his election. 2. *Danv.* 229.

If a man grants an annuity for years, an action of debt may be brought during the years, for being a grant for years it is by the deed as a contract. *Cro. Eliz.* 268, 895. 1 *Bulſtr.* 151. 2 *New Abr.* 18. See ANNUITY.

If A. covenants with B. to pay him ſo much money as he ſhall expend in repairing, &c. a ſhip, and B. expends 300 l. accordingly, *debt* or *covenant* lies. 2 *New Abr.* 20. And debt was adjudged a good action tho' the certainty of the debt did not appear by the deed. 2 *Jon.* 184.

If a leſſee for years aſſign over his whole term by indenture, reſerving rent, the leſſee by the name of rent, may recover in an action of debt upon the contract; altho' it was objected, that the leſſee having no reverſion, it was a term in groſs, and therefore not recoverable 'till the term was expired. *Carth.* 161.

Debt would alſo lie againſt a ſecond aſſignee. *Carth.* 162. Huſband poſſeſſed of a term in right of his wife, makes a leaſe for half the term, and dies, his executors ſhall have debt for the rent, and yet the wife ſhall have the reverſion. *Dyer* 227.

Action of debt will not lie for a wager. *Ld. Raym.* 69. See GAMING.

On a covenant or promiſe to pay money, &c. as often as the money is not paid according to it, ſo often there is a breach of the covenant or promiſe, and conſequently ſo often an action will lie. *Co. Lit.* 292. *b.*

If a man leaſes lands for years, reſerving yearly 20 l. at four quarterly payments, debt lies for one quarter before the other quarters are paſt. *Co. Lit.* 47. *b.* 292. *b.* So, if reſerving weekly during the term nine quarters of wheat. *Roll. Abr.* 601. See ACT.

COUNCEL. At common law, no councel ſhall be allowed a priſoner upon his trial, upon the general iſſue in any capital crime, unleſs ſome point of law ſhall ariſe proper to be debated. 2 *Hawk. P. C.* 400. They are however frequently allowed to ſtand by a priſoner at the bar, and inſtruct him what queſtions to aſk, or even to aſk queſtions for him, as to matters of fact, and where perſons are indicted for ſuch high treaſon as works corruption of blood or miſpriſon thereof, may make their full defence by counſel, not exceeding

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ing two, named by the prisoner and assigned by the judge' 7 *W.* 3. *c.* 3. and 20 *Geo.* 2. *c.* 30.

An advocate or attorney that betrays his client's cause, or that being retained neglects to attend the trial, by means whereof the cause is lost, is liable to an action on the case. *Pinch. l.* 188. But if a man discovers his evidence to a lawyer, tho' this counsel should afterwards become counsel for another, and discovers this evidence, yet no action lies against him, because he was not retained. 1 *Roll. Abr.* 91.

Counsel guilty of deceit or collusion are punishable by the stat. *Westm.* 1. 3 *Edw.* 1. *c.* 28. with imprisonment for a year and day, and perpetual silence in the courts: The punishment may be now inflicted, for gross misdemeanors in practice. *Raym.* 376.

If I retain a lawyer to be my counsel to obtain such a manor, if he does his duty, tho' he does not obtain it, no action lies against him: But if he afterwards becomes the counsel of my adversary in this matter against me; an action upon the case will lie against him. 1 *Roll. Abr.* 91. See SLANDER.

COUNTERPARTS. It is common in some deeds to have two copies, one for each party: That executed by the grantor is called the *original*, and the other the *counterpart*; but the more usual practice at this time is for all the parties to execute every part, which renders them all originals.

CREDIBLE WITNESS. See WITNESS.

CRIMINALS. Tho' it has been a disputed point, yet it seems the better opinion and not at all incongruous, that a person who having been pardoned of a felony, or burnt in the hand, should be proceeded against in a civil action at the suit of the party injured; it seems rather agreeable to the dictates of reason, that he should not only for the public good suffer a public example, but also answer in damages to the injured party. But it is plain that whilst under prosecution for a criminal offence he cannot be proceeded against in a civil suit for the same crime, because it would tend to impede all exemplary punishment. *Stile* 346. *Yelv.* 9[illegible] *Jones* 147. *Latch* 144.

In *case* against a husband and wife, the plaintiff declared that the wife *maliciously*, *&c.* affirmed herself to be unmarried, and *strenuously besought him* to marry her; to which giving credit he married her, she being then the defendant's wife, by which he was put to great charge, injured his reputa[illegible]

DEAD BODY.
DECEIT. See
DEEDS. See W
DEFAMATION.

reputation, and greatly troubled in his conſcience; and the court held, that the ground of action being the converſation and contract of the wife, could not bind the action. 1 *Sid.* 275. 1 *Lev.* 247. 2 *Keb.* 399. Twiſden ſaid that this action does not lie; becauſe the marrying the ſecond huſband is felony. *But Q.?*

However the court held that the action did lie where the plaintiff declared that ſhe was a virgin, of good name, &c. and ſought to for marriage by J. S. that the defendant pretending himſelf to be a ſingle perſon, made love to her, and married her; when in truth he was married to another woman, &c. whereby ſhe became of leſs credit, and loſt her marriage, &c. *Skin.* 119.

CRIMINAL *converſation.* Where one commits *adultery* with another's wife, this being conſidered as a *civil* injury, an action at common law may be maintained againſt him, wherein the huſband uſually recovers very ample damages, according to the rank and fortune of the parties, and the previous behaviour and character of the wife, and the huſband's obligation by ſettlement or otherwiſe to provide for thoſe children, which he has reaſon to ſuppoſe are ſpurious. *L. of Niſi Prius.* 26. As a public crime this offence is puniſhable in the ſpiritual courts.

CURTESY. Where a man marries a woman who is ſeiſed of lands, &c. in fee ſimple or fee tail; and has by her iſſue born alive which was capable of inheriting his eſtate. In this caſe, he ſhall, on the death of his wife, hold the lands for his life, as tenant by the curteſy of England. *Litt. ſ.* 35. 32. The huſband by the birth of the child becomes tenant by the curteſy *initiate. Co. Lit.* 29. And may do many acts to charge the lands; but his eſtate is not *conſummate* till the death of the wife. *Ibid.* 30.

D.

DEAD BODY. See CORPSE.
DECEIT. See CHEAT and SALE.
DEEDS. See WRITINGS.
DEFAMATION. See SLANDER.

DEFENDANT. It may not be improper under this title to point out the proper objects to whom the law looks for the redress of injuries.

Debt.

An action of debt must be brought against the party that originally owed the same, if he be living; but after his death against his executor, if there be any that hath taken upon himself the executorship.

If the original creditor died intestate, then it lies against the administrator, but if none be appointed by the ordinary, then against the ordinary himself, and if he dies possessed of the goods, then against his executor.

If an executor die after he has accepted the administration, then against his executor, and so on *ad infinitum:* But when no such executor of the executor be made, then against the administrator *de bonis non*; and if the administrator of the first intestate, then against the administrator of that administrator, being administrator *de bonis non*. 5 *Co.* 9. *Dyer* 112, 160, 271.

But it lies not against the executor of an administrator for the debt of the intestate, *vide ib. and F. N. B.* 120. *Westm.* 2. *c.* 19. Nor will it lie against an executor or administrator of a lessee for years for rent, where the lessee or his executors or administrators have assigned the term. 3. *Co.* 23.

Action of debt lies against an heir bound by the deed of the ancestor, where the executors have not sufficient; but *nil per discensum*, is a good plea if he alien the assets before action brought, unless it be fraudulently to deceive creditors. 5 *Co.* 60. And see *Noy* 56. That debt lies against the executor of the heir.

If a woman sole be indebted and afterwards take a husband, it becomes the debt of both, and the wife ought to be sued together with the husband, and if the action be abated by the death of the husband, the wife may be again sued for this debt. *Pract. Reg.* 105. But if the woman dies, the man is not liable, unless judgment was had against them both during the marriage. See *Noy* 19. Where the wife shall not be sued for the husband's debt.

If a feme, lessee for life, takes husband and dies, debt lies against the husband for rent issuing out of the land incurred during coverture; for he took the profits out of which the rent issued. 10 *H.* 6. 11. 26 *E.* 3. 64. 1 *Roll. Abr.* 595.

All

Alſo it lies againſt him or his executors, for the arrears of a rent charge incurred during the time he took the aſſets. 4 *Co.* 49. *b.*

An infant is liable to pay for his meat, drink, cloaths, phyſic, teaching, and other neceſſaries; but if he enter into a bond for it, or come to an account, an action of debt doth not lie againſt him on the account ſtated, and he may avoid the bond by pleading *infra etatem.* 18 *Ed.* 4. 3.

If a leſſee for years aſſigns all his intereſt to another, the leſſor may have an action of debt againſt the leſſee. 4 *Leon.* 17. 3 *Co.* 24. But if he once accepts the rent from the aſſignee, he ſhall not afterwards charge the leſſee for rent due after the acceptance. 3 *Co.* 24. *b. Marrow and Turpin. Moor* 600. *pl.* 829. 2 *And.* 133. And ſee 1 *Sid.* 402. For in the acceptance of the rent from the aſſignee, notice of the aſſignment is implied. *March and Brace. Cro. Jac.* 334. adjudged. 2 *Bulſt.* 152. adjudged. And ſee 1 *Roll. Rep.* 366. But tho' he refuſes to accept the aſſignee as his tenant, yet he may after charge him in an action for the rent, if he pleaſes. *Devereux and Barlow,* 2 *Saund.* 181.

If a leaſe for life or years be made to an huſband and wife, reſerving rent, an action of debt for rent arrear may be brought againſt both, for this is for the advantage of the wife. 17 *E.* 4. 7. 1 *Roll. Abr.* 348.

Caſe.

If I deliver my horſe to a ſmith to ſhoe, and he delivers him to another ſmith who pricks him, I may have an action on the caſe againſt him, though I did not deliver the horſe to him. 1 *Roll. Abr.* 90.

If I deliver goods to A. who delivers them to B. to keep to the uſe of A. and B. waſtes them, I may have an action upon the caſe againſt B. though I did not deliver them to him. *Idem.*

No maſter is chargeable with the act of his ſervant, but when he acts in execution of the authority given by his maſter, and then the act of the ſervant is the act of the maſter. 1 *Salk.* 282.

If the ſervant of a taverner ſells wine that is corrupt, knowingly, action of deceit does not lie againſt the ſervant, tho' the maſter did not command him to ſell it to any particular perſon, for he did it but as ſervant; but an action on the caſe lies againſt the maſter. 9 *H.* 6. 53. 1 *Roll. Abr.* 95.

But if a ſervant ſells an unſound horſe, or other merchandize, in a fair, no action lies againſt the maſter, for he does not command him to ſell to any particular perſon; yet if the ſervant by the command and covin of the maſter, ſells to any particular perſon, an action lies againſt the maſter, for then it is his own ſelling. *Idem.* 2 *Roll. Rep.* 6. *Poph.* 143. *Bridgm.* 128.

If an attorney in an action of debt knows of, and was witneſs to a releaſe of the debt made antecedent to the commencement of the action for it, yet as the attorney acts only as a ſervant, &c. in the way of his calling and profeſſion no action lies againſt him. 1 *Mod.* 209.

If a goldſmith makes plate, in which he mingles droſs, ſo that it is not according to the ſtandard, and by his ſervant ſells it; an action lies againſt the maſter becauſe it fails in the price in ſilver. *Cro. Jac.* 471. 2 *Roll. Rep.* 28.

An action on the caſe was brought againſt huſband and wife, for retaining and keeping the plaintiff's ſervant, and judgment was had accordingly. 2 *Lev.* 63.

An action of *aſſumpſit* lies not againſt an huſband and wife on a promiſe made by the wife during marriage, for as to the wife, it is void. *Palm.* 313.

For all wrongs or treſpaſſes done by the wife during marriage, the action muſt be againſt both huſband and wife. See BARON and FEME.

Slander.

If two ſlander one they muſt be ſued ſeverally: for as the words ſpoken by the one are not the words ſpoken by the other, they cannot be charged jointly. *Cro. Ja.* 647. *Palm.* 313. *Dyer* 19. If the ſlander proceed from the wife, the huſband and wife muſt be ſued and not the wife alone.

If a man ſlanders my title, whereby I am wrongfully diſturbed in my poſſeſſion, a remedy may be had either againſt the treſpaſſer or ſlanderer. *Allen.* 3.

Treſpaſs.

If A. commands or requeſts B. to take the goods of C. and B. does it, an action of treſpaſs lies againſt A. as well as againſt B. *Salk.* 409.

If A. agrees to a treſpaſs with force, which has been committed by B. to the uſe of A. an action of treſpaſs lies againſt A. although it was not done either in purſuance of his command, or at his requeſt. *Ero. Treſp. pl.* 113, 256.

2 But

But if B. has been compelled by C. to commit a treſpaſs with force, the latter only is liable to this action. *Sty.* 65.

If divers have been parties to a treſpaſs with force, the party injured has his election to bring an action againſt them all, or againſt any one or more of them. 8 *Rep.* 159.

But if the party injured by a treſpaſs with force has brought this action againſt ſome one or more of the parties to the treſpaſs, he cannot bring a ſecond action againſt any other of them. *Cro. Eliz.* 667. 6 *Rep.* 7. *Hob.* 137.

If a ſervant without either the command or aſſent of his maſter, puts a beaſt of his maſter's into the cloſe of J. S. the maſter is not liable to an action of treſpaſs, but the ſervant is. 2 *Roll. Abr.* 553.

But if a wife does ſo, it lies againſt her huſband. *Ibid.*

Trover.

If goods come to a wife by trover, the action may be brought againſt the huſband and wife; but the converſion muſt be laid only in the huſband, becauſe the wife cannot convert goods to her own uſe; and the action is brought againſt both, becauſe both were concerned in the treſpaſs of taking them. *Co. Lit.* 351. 1 *Roll. Abr.* 6, 348. *Yelv.* 166. *Noy* 79. 1 *Leon.* 312. *Cro. Car.* 494, 254.

DELIVERY OF GOODS. See BAILMENT AND SALE.

DELIVERY OF MONEY. If A. delivers money to B. to pay over to C. and gives C. a bill of exchange drawn upon B. and B. accepts it, C. may have an action of *indebitatus aſſumpſit* againſt B. as having received money to his uſe; but muſt not declare only on the bill of exchange accepted. 1 *Vent.* 153. So, if goods are received. 1 *Roll. Abr.* 32.

So if A. gives money to B. to pay to C. upon C's. delivering up writings, &c. and C. will not do it, an action of *indebitatus* will lie for A. againſt B. for ſo much money received to his uſe. 6 *Mod.* 161.

DELIVERY *of a deed.* The delivery of a deed is neceſſary to the completion of it, and it is made either by the party himſelf, or his certain attorney: The party takes the deed in his hand, and delivering it back again, ſays, "I deliver "this as my act and deed." And if it be for any particular uſes, he adds, "for the ſeveral uſes therein mentioned."

DEMAND. See ACT.

DEMOLISHING *churches, &c.* By the 9 *Geo.* 1. *c.* 22. It is enacted, that unlawfully, riotouſly, tumultuouſly, and forcibly to demoliſh or to pull down, or to begin to demoliſh or pull down, any church, chapel, or meeting-houſe; or any

dwelling-houſe, barn, ſtable or out-houſe; is felony *ſans* clergy.

DEODAND. Whatever perſonal chattel is the immediate cauſe of the death of any reaſonable creature, is called a deodand, and is forfeited to the king, to be applied to pious uſes, and diſtributed in alms by his high almoner. 1 *Hal P. C.* 419. *Fleta. l.* 1. *c.* 25. Juries have of late very frequently taken upon themſelves to mitigate theſe forfeitures, by finding only ſome trifling thing, as part of any entire thing, to have been the occaſion of the death. *Foſter of Homicide.* 266.

DESCENT. Deſcent or hereditary ſucceſſion, is the title whereby a man on the death of his anceſtor, acquires his eſtate by right of repreſentation, as his heir at law. An heir therefore is he upon whom the law caſts the eſtate immediately on the death of the anceſtor; and an eſtate, ſo deſcending to the heir, is in law called the inheritance.

The nature of deſcents may be reduced to the following rules or canons:

1. Inheritances ſhall lineally *deſcend* to the iſſue of the perſon laſt actually ſeiſed *in infinitum*; (as to ſons, daughters) but ſhall never lineally *aſcend* (as to fathers, grandfathers, &c.)

2. That the male iſſue ſhall be admitted before the female (or if there be ſeveral daughters and but one ſon, the ſon ſhall inherit, in excluſion of all the daughters); but daughters ſhall ſucceed before any collateral relations (that is, if the perſon laſt ſeiſed leave brothers or nephews, &c. and alſo daughters, but no ſon, the daughters who are lineal deſcendants, ſhall inherit before the brother's uncles, nephews, &c. who are collateral relations of the perſon laſt ſeiſed).

3. Where there are two or more males in *equal degree of kindred*, the eldeſt only ſhall inherit (as if there be ſeveral ſons, the eldeſt only ſhall inherit in excluſion of the reſt) but the females ſhall inherit all together as coparceners; without any preference.

4. The lineal deſcendants *in infinitum* of any perſon deceaſed, ſhall repreſent their anceſtor, that is, ſhall ſtand in the ſame place as the perſon himſelf would have done had he been living: thus, the child, grandchild or great-grandchild (either male or female) of the eldeſt ſon ſhall ſucceed before the younger ſon and ſo *in infinitum:* And theſe *repreſentatives* ſhall take neither more nor leſs, but juſt ſo much a

as their *principals* would have done. As if there be two ſiſters, M. and C. and M. dies leaving ſix daughters; and then the father of the two ſiſters dies without other iſſue, thoſe ſix daughters of M. ſhall take among them exactly the ſame as their mother would have done and no more: this is called ſucceſſion in *ſtirpes*. And in collateral deſcents, if a man's heirs be ſix nieces, three by one ſiſter, two by another, and one by a third, his inheritance is divided into three parts, and diſtributed *per ſtirpes*. If a man has only three daughters, C. D. and E; and C. dies leaving two ſons, D. leaving two daughters, and E. leaving a daughter and a ſon who is younger than his ſiſter; here, when the grandfather dies, the eldeſt ſon of C. ſhall ſucceed to one third, the two daughters of D. to another third in partnerſhip; and the ſon of E. to the remaining third, excluding the others.

5. On a failure of lineal deſcendants, or iſſue of the perſon laſt ſeiſed, the inheritance ſhall deſcend to the blood of the firſt purchaſer; ſubject to the three preceding rules: thus if G. S. purchaſe land and it deſcends to his ſon who dies without iſſue; whoever ſucceeds to this inheritance muſt be of the blood of the firſt purchaſer G. S. Yet when an eſtate hath really deſcended in a courſe of inheritance to the perſon laſt ſeiſed, none are admitted, but the heirs of thoſe thro' whom the inheritance hath paſſed: for all others have demonſtrably none of the blood of the firſt purchaſer in them, and therefore ſhall never ſucceed: as, if lands come to J. S. by deſcent from his mother L. B. in this caſe, no relation of his father (as ſuch) ſhall ever be heir of theſe lands; and ſo *vice verſa:* So if the eſtate deſcended from his father's father, the relations of his father's mother ſhall never be admitted, but only thoſe of his father's father.

The remaining rules are only rules of evidence, calculated to inveſtigate who the purchaſing anceſtor was; which in *feudis vere antiquis*, has in proceſs of time been forgotten, and is ſuppoſed to be in feuds that are held *ut antiquis*.

6. A ſixth rule or canon therefore is, that the collateral heir of the perſon laſt ſeiſed (as his brother, ſiſter, &c.) muſt be his next collateral kinſman of the *whole blood* [See BLOOD] either perſonally or by right of repreſentation, which nearneſs of kindred is reckoned according to the degrees of conſanguinity. Therefore the brother being in the firſt degree, he *and his deſcendants* ſhall exclude the uncle *and his iſſue*, who is only in the ſecond degree. On failure of iſſue of the

perſon laſt ſeiſed, the inheritance ſhall deſcend to the iſſue of his next immediate anceſtor. Thus if J. dies without iſſue, his eſtate ſhall deſcend to his brother, who is lineally deſcended from his next immediate anceſtor, or father. On failure of brethren, ſiſters and their iſſue, then to the uncle of J. who is the lineal deſcendant of his grandfather, and ſo *in infinitum*, the lineal anceſtor therefore tho' himſelf incapable [under the firſt rule] is yet the common ſtock from which the next heir muſt ſpring.

This kinſman who will thus inherit, need not be the neareſt kinſman abſolutely; but he muſt be the neareſt kinſman of the *whole blood*; for if there be a much nearer kinſman of the *half blood*, a more diſtant one of the *whole blood* ſhall be admitted: for the whole and the half blood can never inherit to each other, the land ſhall rather eſcheat to the lord. If a father has two ſons, A. and B. by different wives, theſe two brothers ſhall not be heirs to each other, nay even if the father dies and his lands deſcend to A. who enters and dies without iſſue, B. ſhall not be heir to A: but had A. died without entry, then B. might inherit; not as heir to A. but as heir to their common father who was the perſon laſt actually ſeiſed. Eſtates muſt deſcend to the iſſue of the neareſt *couple* of anceſtors that have left deſcendants behind them; becauſe the deſcendants of *one* anceſtor only, are not ſo likely to be in the line of that purchaſing anceſtor, as thoſe who are deſcended from two.

7. In collateral inheritances the male ſtock ſhall be preferred; that is, the kindred derived from the blood of the male anceſtors ſhall be admitted before thoſe from the blood of the female, unleſs the lands have in fact deſcended from a female. See BLOOD and EXECUTORS.

DESERTION. Deſertions from the king's armies in time of war, whether by land or ſea, in England or in parts beyond the ſeas, is by the ſtanding laws of the land (beſides the general mutiny act) and eſpecially by the 18 *H.* 6. *c.* 19. and 5 *Eliz. c.* 5. made felony, but not without benefit of clergy.

DETAINER. } See TROVER.
DETINUE. }

DETAINING GOODS. See INNKEEPERS.

DILAPIDATIONS. See CASE.

DISABLING. See MAYHEM.

DISCOVERY *on oath*. In many inſtances where diſcoveries are wanted to be made, and cannot be obtained but on the party's

ty's own oath, it may be done by filing a bill in chancery, which interrogates him in all material points, &c. to which he may be compelled to anſwer in the common courſe of the practice of that court. See CHANCERY.

DISORDERLY HOUSES, &c. See NUSANCES.

DISTRESS. A diſtreſs may be taken, 1. For any kind of rent in arrear, the detaining whereof beyond the day of payment is an injury to him that is intitled to receive it. 2. For neglecting to do ſuit to the lord's court, or other certain perſonal ſervice. *Bro. Abr. tit. Diſtreſs.* 15. *Co. Lit.* 46. 3. For amercements in a court-leet but not in a court-baron without a ſpecial preſcription to warrant it. *Brownl.* 36. 4. Where a man finds beaſts of a ſtranger wandering in his grounds, doing him damage by treading down his graſs or the like; in which caſe the owner of the ſoil may diſtrain them, 'till ſatisfaction be made him for the injury he has ſuſtained. 5. For ſeveral duties and penalties inflicted by ſpecial acts of parliament. 3. *Black. Com.* 7.

It is a general rule that all chattels perſonal are liable to be diſtrained, unleſs particularly privileged or exempted: and things exempted are, 1. All animals wild by nature, and dogs, cats, &c. cannot be diſtrained: yet if deer are kept in a private incloſure for the purpoſe of ſale or profit, they by this become a kind of merchandize, and may be diſtrained for rent. 2. Whatever is in the perſonal uſe or occupation of any man, is for the time privileged from any diſtreſs; as an ax with which a man is cutting wood, or a horſe while a man is riding him. But horſes drawing a cart may (cart and all) be diſtrained for rent; and alſo if a horſe be taken *doing damage*, or treſpaſſing in another's grounds, the horſe (notwithſtanding his rider) may be diſtrained and led away to the pound. 3. Valuable things in the way of trade ſhall not be liable to diſtreſs, as a horſe ſtanding in a ſmith's ſhop to be ſhoed, or in a common inn; or cloth at a taylor's houſe; or corn ſent to a mill, or a market; for theſe are ſuppoſed not to belong to the owner of the houſe, but to his cuſtomers. But, generally ſpeaking, whatever goods and chattels the landlord finds upon the premiſes, whether they in fact belong to the tenant or a ſtranger, are diſtrainable by him for rent: for otherwiſe a door would be open to infinite frauds upon the landlord, and the ſtranger has *his* remedy over by action on the caſe againſt the tenant, if by the tenant's default the chattels

chattels are diſtrained, ſo that he cannot render them when called upon. With regard to a ſtranger's beaſts which are found on the tenant's land, the following diſtinctions are taken. If they are put in by conſent of the owner of the beaſts, they are diſtrainable immediately afterwards for rent by the landlord. So alſo if the ſtranger's cattle break the fences, and commit a treſpaſs by coming on the land, they are diſtrainable immediately by the leſſor for his tenant's rent, as a puniſhment to the owner of the beaſts for the wrong committed through his negligence. But if the lands were not ſufficiently fenced ſo as to keep out cattle, the landlord cannot diſtrain them, 'till they have been *levant* and *couchant*, i. e. long enough on the land to have laid down and roſe up to feed; which in general is held to be one night at leaſt. Yet if the leſſor or his ſervant were bound to repair the fences and did not, and thereby the cattle eſcaped into their grounds without the negligence or default of the owner; in this caſe, though the cattle may have been *levant* and *couchant*, yet they are not diſtrainable for rent, 'till actual notice is given to the owner that they are there, and he neglects to recover them. 4. A man's tools and utenſils of his trade cannot be diſtrained, and upon the ſame principle beaſts of the plough, and ſheep, are privileged from diſtreſſes at common law, while dead goods or other ſort of beaſts, may be diſtrained. But, as beaſts of the plough may be taken in execution for debt, ſo they may be for diſtreſſes by ſtatute, which partake of the nature of executions. 5. Nothing ſhall be diſtrained for rent, which may not be rendered again in as good condition as it was diſtrained: for which reaſon milk, fruit and the like, cannot be diſtrained; but by the 2 *W. and M. c.* 5. Corn in ſheaves or cocks, or looſe in the ſtraw, or hay in barns or ricks, or otherwiſe, may be diſtrained as well as other chattels. 6. Laſtly, things fixed to the freehold may not be diſtrained; as caldrons, windows, doors and chimney-pieces; for they ſavour of the realty; and by the 11 *Geo.* 2. *c.* 19. landlords may diſtrain corn, graſs, or other products of the earth, and cut and gather them when ripe. *Idem.* 8, 9, 10.

All diſtreſſes muſt be made *by day*, except in caſe of beaſts *doing damage*. And, where a perſon intends to make a diſtreſs, he muſt by himſelf or his bailiff, enter on the demiſed premiſes; formerly during the continuance of the leaſe, but now by the 8. *Ann. c.* 14. within ſix months after

if the tenant holds over; provided his own title and intereſt, as well as the tenant's poſſeſſion, continue at the time of the diſtreſs. And by the ſame *ſtat.* together with the 11. *G.* 2. *c.* 19. if he does not find ſufficient diſtreſs on the premiſes, he may within thirty days after diſtrain any goods of his tenant, carried off clandeſtinely, wherever he finds them, unleſs they have been fairly ſold for a valuable conſideration: and all perſons privy to, or aſſiſting in ſuch fraudulent conveyance of the goods, ſhall forfeit double the value to the landlord. The landlord may alſo diſtrain the beaſts of his tenant, feeding upon any commons or waſtes appendant or appurtenant to the demiſed premiſes. And he may, by the aforeſaid ſtatute of the 11 *G.* 2. *c.* 19. by the aſſiſtance of the peace-officer of the pariſh, break open, in the day time, any place whither the goods have been fraudulently removed and locked up to prevent a diſtreſs; oath being firſt made, in caſe it be a dwelling-houſe, of a reaſonable ground to ſuſpect that ſuch goods are concealed therein. *Ibid.* 11.

If there is not ſufficient on the premiſes, or the diſtrainer happens to miſtake in the value of the thing diſtrained, and ſo takes an inſufficient diſtreſs, he may take a ſecond to complete his remedy. *Cro. Eliz.* 13. *Stat.* 17. *Car.* 2. *c.* 7. 1 *Burr.* 590.

Diſtreſſes muſt be reaſonable, for by the ſtatute, *Marlbridge* 52. *H.* 3. *c.* 4. if a man takes a great, or unreaſonable diſtreſs, for rent arrear, he ſhall be heavily amerced; and the remedy is by an action on the ſtatute of Marlbridge; for an action of treſpaſs is not maintainable upon this account, it being no injury at the Common Law. 1 *Ventr.* 104.

By the 11*th G.* 2. *c.* 19. any part of the premiſes upon which a diſtreſs is taken may be turned into a pound, *pro hac vice*, for ſecuring of ſuch diſtreſs. If a live diſtreſs be impounded in the common pound, the owner muſt take notice at his peril; but if in any ſpecial pound *overt*, (that is, open overhead) ſo conſtituted for this particular purpoſe, the diſtrainer muſt give him notice; and in both theſe caſes the owner, and not the diſtrainer, is to ſuſtain them; but if they are put into a pound *covert*, (that is cloſe) as a ſtable, &c. the landlord, or diſtrainer, muſt feed and provide for them. *Co. Lit.* 47. If a diſtrainer puts goods, &c. in a pound *overt* he muſt anſwer for the conſequences.

Goods

Goods diſtrained for rent ſhould be appraiſed by two ſworn appraiſers, and ſold, if not replevied within five days after the diſtreſs, and notice thereof, rendering the overplus, if any, to the owner himſelf.

If a beaſt has been diſtrained *doing damage*, an action does not lie for the damage done, becauſe the poſſeſſor of the land, who has made his election to diſtrain, ought not to have a double remedy for the ſame injury. 12 *Mod.* 663. *Salk.* 248. But if the beaſt dies, or eſcapes without the diſtrainer's default, an action of treſpaſs lies. *Ibid. Ld. Raym.* 720.

DISTURBANCE. If A. being a maſon, and uſing to ſell ſtones, is poſſeſſed of a certain ſtone pit, and B. intending to diſcredit it, and deprive him of the profit of the ſaid mine, impoſes ſo great threats upon his workmen, and diſturbs all comers, threatening to maim and vex them with ſuits if they bought any ſtones, ſo that ſome deſiſt from working, and others from buying, &c. A. ſhall have an action upon the caſe againſt B. for the profit of his mine is thereby impaired. *Cro. Jac.* 567. 1 *Roll. Abr.* 162.

If a man menaces my tenants at will, of life and member, by which they depart from their tenancies, an action upon the caſe lies; but unleſs they depart no action lies. 1 *Roll. Abr.* 108.

DISTRIBUTION of Inteſtates Effects. See EXECUTORS.

DIVIDEND of Bankrupts Effects. In making ſuch dividends regard is to be had only to the *quantity*, and not to the *quality* of debts, except mortgages, for which the creditor has a real ſecurity in his own hands, and perſonal debts, where the creditor has a chattel in his hands as a pledge or pawn for the payment, or has taken the debtors lands or goods in execution. And upon the equity of 8 *Ann. c.* 14. it has been held that the landlord ſhall be allowed his arrears of rent to the ſame amount, in preference to other creditors.

DOGS. If a perſon ſteal or kill another's dog, he may maintain an action of treſpaſs *vi & armis* for the loſs of it; but they are not of ſuch eſtimation, as that the crime of ſtealing them amounts to larceny. 1 *Hal. P. C.* 512.

If a man keeps a dog, or other brute animal uſed to do miſchief, as by worrying ſheep, or the like, the owner muſt anſwer the conſequences, *if he knows of ſuch evil habit.* 1 *Danv. Abr.* 19.

If J. S. is chacing the beaſt of J. N. with a maſtiff dog, in order to drive it out of land in his poſſeſſion, and J. N. to prevent miſchief to the beaſt kills the dog, an action does not lie. 1 *Freem.* 247.

An action does not lie for the killing of a dog found in a warren; for ſuch dog is, in the eye of the law, a ſpecies of vermin. *Cro. Jac.* 45. *Sid.* 336. And it has been held, that the killing of a dog found in a park is juſtifiable, although ſuch dog might have been taken alive. 3 *Lev.* 28.

DOORS BREAKING. See HOUSE.

DRAUGHT for MONEY. See BILL of EXCHANGE.

DOWER. Dower is that part of the huſband's eſtate that comes to the wife upon the death of her huſband, and is the third part of all the lands whereof the huſband has been ſeiſed during the marriage, of ſuch an eſtate as the children by ſuch wife might, by poſſibility, have inherited, and to which, by the death of her huſband, ſhe is intitled for her life.

The law allows the widow to continue in the capital meſſuage, or ſome other houſe whereof ſhe is dowable, 40 days incluſive after her huſband's death; and during this time is to be provided with all neceſſaries at the heirs expence, and before the end thereof to have her dower aſſigned to her. 1 *Inſt.* 32. *b.* 34. *b.* And this is called her *quarentine.*

A woman ſhall not be endowed of an annuity to a man and his heirs after a writ of annuity brought, but if a rent-charge be granted to a man and his heirs, and before any diſtreſs made the huſband die, the wife ſhall have her dower; but if he brings an annuity, and recovers judgment before the wife, then it is become an annuity for ever, and the wife ſhall be barred. *Perk.* 341. *Co. Lit.* 32. *a. Moor* 83.

A woman ſhall not be endowed of copyhold lands, unleſs there be a ſpecial cuſtom for it. 4 *Co.* 22. *Hob.* 216. 5 *Co.* 116. And by the 32*d H.* 8. women are dowable of tithes; and the beſt way to aſſign dower of tithes is the third ſheaf, or the third part of the tithes generally.

A woman may be endowed of common of paſture in groſs, which is certain; but not of common without number of cattle. *Perk.* 341, 342. She may alſo be endowed of a mill, though it cannot be divided, and therefore ſhe ſhall have the third toll-diſh, or the whole mill for every third month. *Co. Lit.* 32. *a. Brook.* 39.

If

If the husband is seised of a joint estate, and dies, the wife shall not be endowed, but it shall go to the survivor. 3 *Co.* 27. *Brook* 4. 84. But of a tenancy in common she shall, for there no survivorship takes place, but each moiety descends to the respective heirs of the respective tenants in common. *Co. Lit.* 34. *b. Lit.* §. 44, 45.

Three things are necessary to intitle the wife to dower: 1. The marriage. 2. The seisin of the husband during the coverture, either in fact or in law. And, 3. His natural death.

If the husband being seised of lands in fee, exchanges them for other lands, and die, the wife has her election of which lands she shall be endowed, for the husband was seised of both during the coverture. *Perk.* 318, 319.

If a husband and wife join in levying a fine, or suffering a common recovery, this shall bar her of her dower totally. *Plow.* 515. *Brook* 77. And if the husband levy a fine with proclamations of his lands, and dies, unless the wife make her claim within 5 years after his death, she shall be barred of her dower. 2 *Co.* 93. *Dyer* 224.

A jointure may be made before marriage which may bar the wife's dower, but if it be made during the coverture she has her election after her husband's death, to refuse it and claim her dower. 1 *Bulst.* 173. *Dyer* 358.

By the statute *W.* 2. *c.* 34. if a wife elopes, or is taken away against her will, and afterwards consents and remains with the adulterer, she shall lose her dower.

If a woman detain the charters of the estate of which she demands dower, such detention is a good plea in bar by the heir; but such detention shall be a bar for no more lands than the charters concern; and if she, upon such plea, deliver them to him, she shall have judgment of dower, but not otherwise, for if it be found against her she shall be for ever barred. 9 *Co.* 17, 18. *Plow.* 85. 1 *Roll. Abr.* 697.

The wife shall hold her dower discharged of judgments, recognizances, statutes, mortgages, or any other incumbrances made by the husband *after marriage*; but if she joins in a grant of rent by fine out of such land, she shall hold her dower subject to such rent.. 4 *Co.* 64, 66.

As to dower by custom, it is to be observed that by the of Gavelkind in rent, the wife shall have the moiety long as she keeps herself chaste and unmarried. *Co. Li*

33. *b.* By the cuſtom of Borough-Engliſh, the widow ſhall have the whole of her huſband's lands in dower, which is called her free-bench. *Idem.*

DRUNKENNESS. The law looks upon drunkenneſs as an aggravation of, and not an excuſe for an offence. Drunkenneſs is by the *4th Jac.* 1. *c.* 5. puniſhable by a fine of 5s. or by ſitting 6 hours in the ſtocks.

DUEL. The law ſo far abhors all duelling in cold blood, that not only the principal who actually kills the other, but alſo his ſeconds are guilty of murder, whether they fought or not; and ſome have alſo held, that even the ſeconds of the perſon killed are alſo equally guilty. 1 *Hawk. P. C.* 82. See CHALLENGE.

DURESS. Every legal act muſt be free, and without force or reſtraint; for where a man acts from terror or violence he may avoid his own act; or if a man be unlawfully impriſoned, and executes ſome deed for his enlargement, or the like; or where a man is threatened with loſs of life, liberty, &c. *Co. Lit.* 253. 2 *Inſt.* 483. 2 *Roll. Abr.* 124. See NECESSITY.

DYEHOUSES. See NUSANCE.

E.

EARNEST. See SALE.

EAVES-DROPPERS. Theſe are perſons who liſten under walls and windows, to hearken after diſcourſe, and upon this to propagate miſchievous tales: they are a common nuſance, and preſentable at the court-leet. *Kitch. of Courts* 20. Or they are indictable at the ſeſſions, and puniſhable by fine, and finding ſureties for their good behaviour. 1 *Hawk. P. C.* 132.

ECCLESIASTICAL COURT. This court is inſtituted for the puniſhment, not of temporal crimes, but of ſpiritual ſins, by penance, contrition, and excommunication: and the end of theſe puniſhments among the *ſacred* function is *politically* ſaid to be, *pro ſalutæ animæ*, for the health of the ſoul; but theſe kinds of puniſhment are frequently ſuperſeded by the payment of a ſum of money to the officers of the court by way of commutation of penance!

EJECTMENT. An ejectment is a remedy given by the law for recovering *poſſeſſion* of lands and tenements unlawfully withheld from the real owner. And where the title to lands is wanted to be tried, an ejectment is the proper action. *F. N. B.* 220. Where the plaintiff in ejectment has a verdict, this only lets him into the poſſeſſion by a writ of *poſſeſſion*, for the damages recovered are ſeldom more than a ſhilling, or ſome ſuch ſum, and a new action muſt be brought to recover the meſne profits received by the defendant from the time of his entry. Where the entry of him that hath right is taken away by deſcent, fine, recovery, 20 years diſpoſſeſſion, diſſeiſin, &c. action of ejectment is not the proper remedy, for all titles cannot be tried by this action.

By the 11 *G.* 2. *c.* 19. all tenants are obliged, on pain of forfeiting 3 years rent, to give notice to their landlords when ſerved with any declaration in ejectment.

ELOPEMENT. See BARON and FEME.

EMBASSADORS. By the 7 *Ann. c.* 12. proceſs whereby an ambaſſador, or his domeſtic ſervant, may be arreſted, or his goods diſtrained, ſhall be utterly void; and perſons proſecuting, ſoliciting, or executing the ſame, upon conviction by confeſſion, or the oath of one witneſs before the Chancellor and the Chief Juſtice, or any two of them, ſhall ſuffer ſuch penalties and corporeal puniſhment as the ſaid judges, or any two of them, ſhall think fit.

EMBRACERY. This is an attempt, by entreaties, promiſes, money, entertainment, or the like, to influence a jury. 1 *Hawk. P. C.* 259. And embracers are liable to fine and impriſonment; and the juror, if by taking of money, perpetual infamy, impriſonment for a year, and forfeiture of tenfold the value.

ENGROSSING. Perſons guilty of *foreſtalling*, *regrating*, or *engroſſing*, may be indicted, and fined, and impriſoned, according to the heinouſneſs of their offence. 1 *Hawk. P. C.* 235.

ENTRY FORCIBLE. Perſons making forcible entries on lands or forcibly detaining after they have peaceably entered may, by ſeveral acts of Parliament, be impriſoned 'till they make fine and ranſom to the King, and may be indicted &c. 1 *Hawk. P. C.* 142.

EQUITY. See AGREEMENT and CHANCERY.

ESCAPE

ESCAPE. If the ſheriff, or other officer, who hath the cuſtody of a priſoner, either bail him when he is not bailable by law, or ſuffer him to go out of the limits of the priſon, though without a keeper, and for ever ſo ſhort a time, it is an eſcape. 1 *Roll. Abr.* 806. 3 *Co.* 44. *Plowd.* 36. *Dyer* 166. *Hetly* 34. This is the doctrine of the 8 & 9 *W.* 3. *c.* 26. for there it is declared, that if they are at large out of the rules of their reſpective priſons (except by a *habeas corpus*, or rule of court, obtained by motion or petition) this ſhall be adjudged an eſcape. And in 2 *Show.* 298. it is ſaid, that the intent of a day-rule is, that the priſoner may be brought to Weſtminſter-Hall, and by indulgence they have been allowed to go to any of the Inns of Court to conſult with their counſel or attornies; but that ſuffering them to go on their pleaſure, as to the play-houſe, &c. is an eſcape.

If on a writ of *habeas corpus* the ſheriff, goaler, &c. by colour of ſuch writ let the priſoner go at large, or carries him round a great way, &c. it is an eſcape. *Hob.* 202. *Hard.* 476. 1 *Mod.* 116. *Cro. Car.* 14.

By the 8 & 9 *W.* 3. *c.* 26. if any priſoner in execution ſhall eſcape by any means however, the creditor, at whoſe ſuit he was in execution, may retake him by any new *capias*, or *capias ad ſatisfaciendum*.

If the ſheriff ſuffer a perſon arreſted on meſne proceſs to eſcape, an action lies againſt him on account of the delay and prejudice which the party receives thereby. 2 *Roll. Abr.* 99, 807.

If a goaler, or ſheriff's-officer, ſuffer the party to eſcape, the action muſt be brought againſt the ſheriff. 1 *Lev.* 159. 1 *Roll. Abr.* 94. So, an action lies not againſt the bailiff for refuſing bail, but for not carrying the party before the ſheriff in order to put in bail. 2 *Mod.* 32.

By the 1 *Ann. c.* 6. on oath of an eſcape before a judge of the court where the action is brought, an eſcape-warrant may be obtained againſt the perſon eſcaping, upon which he may be taken on a Sunday. 2 *Salk.* 626.

The proper action againſt the ſheriff for eſcapes upon meſne proceſs is a ſpecial action on the caſe. 2 *Inſt.* 382. And by the conſtruction of the ſtatute, *Weſtm.* 2. action of debt is given againſt the ſheriff; and by the 1 *Rich.* 2. *c.* 12. againſt the warden of the Fleet for eſcapes in *execution*. And the laſt ſtatute is ſaid to extend to all gaolers

and keepers of priſons, though infants, or feme-coverts. 2 *Inſt.* 382. And the plaintiff has his election either to bring an action upon the caſe or debt for an eſcape in execution. *Cro. Jac.* 288.

If a priſon takes fire, or is broken open by the King's enemies, he ſhall be excuſed: but not if broke by rebels and traitors, for he may have his remedy againſt them. 1 *Roll. Abr.* 808.

EVIDENCE. No evidence ſhould be admitted on a trial, but ſuch as is to the point in iſſue; and therefore where in an action of debt upon bond a defendant having pleaded *non eſt factum, that the bond is not his deed*, he cannot give in evidence at the trial a releaſe of this bond, for this is not to the point in queſtion, and to the iſſue on which he has relied, which is, that it is not his deed.

Evidence is either *written* or *parol*, (in writing or by word of mouth;) the former are records and ancient deeds of 30 years ſtanding: but modern deeds, and other writings require a further proof, for they are not admitted as evidence without verified by the parol teſtimony of witneſſes.

It is a general rule, that the beſt evidence of facts that can be in the nature of things ſhall be produced, if it can be had; and if it cannot, and it be *poſitively* ſhewn to the court that there is no poſſibility to obtain it, then the beſt evidence that can be had will ſuffice. For inſtance, if a deed is wanted to be proved, nothing ſhall be admitted but the very deed itſelf, if it is in being, and the court will require poſitive proof that it has not a being, (as that it is burnt or deſtroyed) before any other is admitted; for it will not ſuffice to ſay *negatively* that it cannot be found: and if ſuch *poſitive* proof is made that it has not a being, then an atteſted copy may be produced, or *parol* evidence given of its contents.

Nor will *hearſay* evidence be admitted of any particular facts, but the perſon himſelf muſt be produced; except it be in proof of any general cuſtoms, as of right of common, &c. of ſome particular town, &c. where the courts are obliged to have recourſe to what has been ſaid as the beſt evidence that can be obtained to prove ſuch cuſtoms.

Books of account, or ſhop-books, are not allowed to be given in evidence for the owner, but a ſervant who made the entry may have recourſe to them in order to refreſh his memory; and if ſuch ſervant (who has been uſed to make ſuch

ſuch entries be dead) upon proving his hand-writing in the book it may be read in evidence. *L. of Niſi Prius* 266. The ſtatute 7 *Jac.* 1. *c.* 12. confines this kind of evidence to ſuch tranſactions as have happened within one year before the action brought, unleſs between merchant and merchant in the uſual intercourſe of trade.

As to *parol* evidence, the proper writ to enforce a witneſs to attend a trial and give evidence is a *ſubpœna*, which requires his appearance on pain of 100*l.* to the king; to which 10*l.* to the party grieved, and equivalent damages to the loſs ſuſtained for want of his evidence, is added by the 5 *Eliz. c.* 9. But no witneſs unleſs his reaſonable expences be tendered him, is bound to appear at all, nor if he does appear, is he until his charges are actually paid him obliged to give evidence; except he reſides within the bills of mortality, and is *ſubpœned* to give evidence within the ſame.

All perſons of ſound mind, except ſuch as are *infamous*, or *intereſted* in the cauſe, are competent witneſſes, tho' the jury is allowed from other circumſtances to judge of their *credibility*. Perſons infamous are ſuch as may be challenged *propter delictum*, and intereſted witneſſes may be examined upon a *voir dire*, if ſuſpected to be ſecretly concerned in the event; or their intereſt may be proved in court. And in this manner an objection muſt be ſupported againſt infamous perſons; for no man is to be examined to prove his own infamy.

Counſellors, attorneys, &c. intruſted with the ſecrets of the cauſe by the party, are not to be examined except as to ſome fact, as, the execution of a deed. *Law of Niſi Prius.* 267.

One credible witneſs is ſufficient to prove a fact to a jury, tho' two or more to corroborate it is more ſatisfactory.

As to the *degree* of proof, where it appears from the nature of the caſe, that *poſitive* evidence might poſſibly have been had, it is required. But, where the fact cannot be poſitively evinced, the doctrine of *preſumptions* in the admiſſion of *circumſtantial* evidence muſt take place: And in this caſe ſuch circumſtances as either *neceſſarily* or *uſually* attend ſuch facts, will be admitted as evidence of ſuch facts 'till the contrary be proved. However *violent* preſumption is ſometimes equal to full proof, for there thoſe circumſtances appear, which *neceſſarily* and *unavoidably* attend the fact. As

if a landlord ſues for rent due at Michaelmas 1754, and the tenant cannot prove payment, but produces an acquittance for rent due at a ſubſequent time, in *full of all* demands, this is a *violent preſumption* that he has paid the former rent, and is equivalent to full proof, and no evidence ſhall be received to the contrary. *Gilb. L. of Evid.* 161.

Probable preſumption ariſing from ſuch circumſtances as *uſually* attend the fact is alſo received; as if, in a ſuit for rent due 1754, the tenant proves the payment of rent due in 1755; this will diſcharge the tenant, unleſs it be clearly ſhewn that the rent of 1754 was retained for ſome ſpecial reaſon, or that there were ſome fraud or miſtake.

Light, or raſh preſumptions have no weight at all. See ACCOUNT BOOKS.

EXCEPTIONS, *bill of*. See BILL OF EXCEPTIONS.

EXECUTIONS. Theſe are judicial writs in conſequence of judgment recovered, and are, 1. A writ of *capias ad ſatisfaciendum*, by which the defendant's body is taken and impriſoned 'till payment be made of the debt, coſts and damages. It alſo lies againſt the plaintiff for coſts when judgment is had againſt him. By the 32 *G.* 2. *c.* 28. if a defendant, charged in execution for any debt leſs than 100 l. will ſurrender all his effects to his creditors (except his apparel, bedding and tools, not amounting to more than 10 l. value) and will make oath of his punctual compliance to the ſtatute, the priſoner may be diſcharged, unleſs the creditors inſiſts on detaining him; in which caſe he ſhall allow him 2 s. 4 d. per week, called his *groats*, to be paid on the firſt day of every week, and on failure of regular payment, the priſoner ſhall be diſcharged. Yet at any time afterwards the creditor may have execution againſt the lands and goods of the defendant, tho' never more againſt his perſon. And when a man is once taken in execution upon this writ, no other proceſs can be ſued out againſt his lands or goods.

If on ſuch a *capias* a return that *he is not found* be made, the plaintiff may ſue out a proceſs againſt the bail, if any were given.

2. The next ſpecies is a *fieri facias*, this takes the goods and chattels of the party, which may be ſold, 'till he has raiſed enough to ſatisfy the judgment and coſts, firſt paying the landlord his rent in arrear, not exceeding one year in the whole. 8 *Ann. c.* 14. The ſheriff may not break open outer-doors, but when entered peaceably may break open any

inner-door. 5 *Rep.* 92. *Palm.* 54. A leaſe for years may be ſold which is a *chattel* real. 8 *Rep.* 171.

3. The next is an *elegit*. By this the goods and chattels are appraiſed, and inſtead of being ſold are delivered to the plaintiff in part ſatisfaction of his debt. If the goods are not ſufficient, then the moiety or one half of his freehold lands, which he had when judgment given, whether held in his own or another's name, are delivered to the plaintiff; to hold, 'till out of the rents and profits thereof the debt be levied, or 'till the defendant's intereſt in the land be expired. 13 *E.* 1. *c.* 18. After this execution the body cannot be taken. All theſe muſt be ſued out within a year and a day after judgment entered, and if after that a *ſcire facias* muſt be firſt had.

If a ſheriff who has a *fieri facias* whereupon to levy of the goods of A. B. takes the goods of C. D an action of treſpaſs *vi et armis* lies againſt the ſheriff; for he is at his peril to take care whoſe goods he takes. 2 *Roll. Abr.* 552.

EXECUTOR. Where ſeveral executors are made, they are in the law as one executor, therefore generally the acts done either *by* or *to* any one of them, are deemed to be done *by* or *to* them all. *Godolph.* 134.

Every intermeddling with the goods of the deceaſed is not an acceptance of the executorſhip, to make one chargeable as executor. As if one does an act of charity or humanity by locking up the goods of the deceaſed to prevent waſte; or by burying him, and ſelling his goods to do it; nor will a man's taking away his own goods that were in the houſe of the deceaſed, or uſing ſome of the goods of the deceaſed in the neceſſary occaſions of the family, amount to an acceptance of the executorſhip, if the ſpecial matter is pleaded. *Dyer* 166, 177. When an executor has accepted the executorſhip, he cannot aſſign it over, or refuſe it. If there are ſeveral executors appointed, and one accepts, and all the reſt refuſe, he that accepts muſt bring actions relating to his executorſhip in all their names, and one may releaſe an action, but an action muſt be brought againſt him or them that act or adminiſter. *Wood. b.* 2. *c.* 6. *Sed Q.?* See ADMINISTRATOR.

The duty of an executor is, 1. To bury the teſtator in a decent manner according to his degree and character, for if they are unreaſonable and unneceſſary, it muſt be at his own expence. 2. He muſt make an inventory of the goods,

effects and debts of the deceaſed, with their value, as appraiſed in the preſence of the executor, by two or more of the creditors or legatees, or two of the next of kin, or in their default by two other honeſt men. It muſt be indented, and one part delivered on oath of the executor or adminiſtrator before the ordinary, &c. the other part the executor or adminiſtrator ſhould keep. 21 *H.* 8. *c.* 5. 3. The executor muſt prove the will before the ordinary, either in common form by his own oath, or by witneſſes beſides his own oath. A caveat may be entered againſt the probate in common form, and tho' proved in common form, the executor may be obliged to prove it again by witneſſes. 4. He muſt pay debts and legacies, and debts before legacies. After the charges of the funeral, inventory, oppoſition by a caveat and the probate, the king is to be preferred for his debts due upon record and ſpecialty, then the forfeitures for not burying in woollen muſt be paid, before any ſtatute, judgment, or other debt or duty whatſoever; afterwards debts to private perſons upon judgments againſt the teſtator in any courts of record, without any condition of firſt and laſt. *Wood. b.* 2. *c.* 6. But ſuch judgments have no preference unleſs doggeted. *ſtat.* 4 *and* 5 *W. and M. c.* 20. He that firſt ſues out execution upon his judgment is preferred. But before execution the executor may pay whom he will firſt. Then ſtatutes or recognizances, thoſe forfeited before thoſe that are for the performance of covenants, &c. when otherwiſe, he may give precedency as he pleaſes before execution. Then arrearages of rent upon leaſes, &c. in writing, (tho' ſome ſay upon parol too, becauſe it favours of the realty in regard of the profits received,) for the leſſor may diſtrain and pay himſelf whether the executor will or not. Then debts upon ſpecialties, as obligations, bills penal, or ſingle bills ſealed without penalty. Laſtly, debts upon bills or notes unſealed, or verbal contracts; for there is no difference betwixt notes and ſhop-book debts, &c. ſome prefer the wages of ſervants, that are within the ſtatute of labourers, before debts due upon ſhop-books. After the debts are paid, he muſt pay legacies, and may prefer himſelf, tho' there is nothing left to pay other legacies; afterwards he may pay which he pleaſes firſt, tho' there is not enough to ſatisfy the other legatees. But the faireſt way where there is not enough, is to pay their proportions. But if there is a ſpecific legacy, or any particular thing given in ſpecie, as a

leaſe,

leaſe, a horſe, a ſilver cup, &c. this muſt be given before any other legacy. *Wood. b. 2. c. 6.*

When legacies are given to children, and a wife is made executrix; and ſhe marries again, ſhe, at the inſtigation of her huſband, will commonly endeavour to diſcount maintenance and education; but this will not be ſuffered in chancery, ſo as to diminiſh the principal ſum, for a mother ought to maintain her children; yet money paid for binding a child an apprentice has been allowed. 2 *Ventr.* 353.

An executor or adminiſtrator is not chargeable with any ſpecial promiſe to anſwer damages out of his own eſtate, unleſs he (or ſome other authoriſed by him) give and ſign a note thereof in writing. ſtat. 29 *Car.* 2. 5. He muſt paſs his accounts concerning the teſtator's goods and chattels before the ordinary. The inventory ſhews what is his charge, and the account muſt be his diſcharge, but it will only diſcharge him from ſuits in the ſpiritual court, and not at common law.

Tho' an executor cannot be compelled to accept an executorſhip, yet if he refuſes to appear upon the ordinary's ſummons, he is puniſhable for a contempt. *Off. of Exec.* 36. 37. But when an executor hath once adminiſtred, he cannot afterwards refuſe to prove the will: And in ſuch caſe the ordinary ſhould compel him to prove the will, &c. *Godolph.* 141. 2 *Mod.* 146.

Of Actions and Remedies againſt Executors and Adminiſtrators.

And herein it is clearly agreed, that executors and adminiſtrators, ſtanding in the place of thoſe they repreſent, ſhall be anſwerable for all their debts, covenants, &c. as far as they have aſſets, and that the teſtator's covenants ſhall extend to them, though not expreſsly mentioned. *Off. of Exec.* 117. *Cro. Car.* 187. 1 *Jon.* 223. *Yelv.* 103.

The taking of an executorſhip is an engagement to anſwer all debts of the deceaſed, and all undertakings that create a debt, as far as there are aſſets, but doth not embark him in the perſonal truſts of the deceaſed; nor is he obliged to anſwer for his ſeveral injuries, which none can tell how they might have been diſcharged or anſwered by the teſtator himſelf. *Plow.* 181. *Off. of Exec.* 120.

Hence it hath been eſtabliſhed as a maxim, that "perſonal actions die with the perſon." But it is now agreed, that an action lies againſt executors, where there is a duty

as well as a wrong; and that they are anſwerable in thoſe perſonal actions which ariſe *ex contractu*, and not *ex maleficio*, for that every contract implies a promiſe to perform it, in which the teſtator himſelf could not wage his law, becauſe he could not make oath that he had diſcharged the duty before the quantam had been aſcertained by a jury. 9 *Co.* 87. 10 *Co.* 77. 6 *Cro. Jac.* 293. *Vaugh.* 101.

And tho' debt on a ſimple contract may be recovered againſt an executor by action of debt, yet it may by aſſumpſit, 1 *Lev.* 200, 201.

So where in caſe againſt an executor the plaintiff declared, that he proſecuted attachment of privilege againſt the teſtator; and that the teſtator, in conſideration that he would forbear any further proceedings promiſed to pay him 50 l. and it was held, that the action lay againſt the executor, this being ſuch a contract as bound the teſtator himſelf. *Hob.* 216 *Ridwell and Catton.*

Alſo it hath been reſolved, that there is no difference between a promiſe to pay a debt certain, and a promiſe to do a collateral act, which is uncertain, and reſts only in damages; as a promiſe to give ſuch a fortune with his daughter, to deliver up ſuch a bond, &c. and that wherever in thoſe caſes the teſtator himſelf is liable to an action, his executors ſhall be liable alſo. *Cro. Jac.* 405, 417, 571. 1 *Jon.* 16. *Palm.* 329. *Cro. Jac.* 662. Alſo. *S. C.* 1 *Roll. Rep.* 266.

Trover lies againſt executors, for this action is not merely *ex maleficio* which dies with the perſon, but here there is ſuppoſed an intention in the teſtator to reſtore the goods to the right owner, for the law will not preſume an intention of injury in any perſon; and therefore the *maleficium* is in the executors, in not making reſtitution accordingly.

And though the rule at common law, that a perſonal action dies with the perſon, hath been conſtrued equally to extend to wrongs and injuries done by or to the teſtator; ſuch as aſſaults and batteries, breaches of truſts, &c. yet it ſeems, that an executor in ſome caſes may within the equity of 4 *E.* 3. *cap.* 7. *de bonis aſportatis in vitâ teſtatoris*, maintain an action for an injury done to his teſtator; whereas if it had been done by the teſtator, it would have come within the rule of *perſonal actions, die with the perſon.* 4 *Mod.* 403. 1 *Salk.* 314. *Salk.* 12, *Vent.* 30. *Sid.* 48, 80. 12 *Mod.* 71. *Ld. Raym.* 40, 437, 698, 733, 973, 1073. *Gilb. Eq. Rep.* 190. *Stra.* 60, 576.

And

And therefore it hath been held, that if a ſheriff ſuffers a perſon in his cuſtody or mean proceſs to eſcape, that the executor of the party, at whoſe ſuit he was in cuſtody, may maintain an action againſt him, becauſe the body of the priſoner being a pledge for the debt, the executor might be otherwiſe without any remedy, which is an injury to the goods and not to the perſon of the teſtator: But in this caſe, if the ſheriff die, the party could have no remedy againſt the executor. 1 *Jon.* 173. *Poph.* 189. *Latch.* 167. *Noy* 87. *Cro. Car.* 297. *S. P.* 1 *Roll. Abr.* 921. *S. P.* 6. *Mod.* 126.

So an executor may charge another executor for a *devaſtavit*, to the injury of his teſtator: but at common law the executor of an executor was not liable for a *devaſtavit* of the firſt executor's. 1 *Salk.* 314.

So where a *fieri facias* the ſheriff made a falſe return, *viz.* that he levied only ſo much, when in truth he had actually levied more; and the executor of the party brought an action for this falſe return, and adjudged, that it lay; for this was not properly an injury done to the perſon of the teſtator, for then *moritur cum perſona*, but it was an injury to his eſtate. 4 *Mod.* 403. *Williams ver. Cary.* 1 *Salk.* 12. *S. C.* adjudged.

If A. obtains a judgment in debt againſt B. as executor to his father, and thereupon A takes out a *fieri facias*, but before the ſheriff can execute it, B. ſecretly and fraudulently ſells, removes and diſpoſes of all the teſtator's goods, ſo that the ſheriff is forced to return *nulla bona*, *&c.* an action upon the caſe lies againſt B. for the ſheriff could not return a *devaſtavit*; and if this action does not lie, the party is without remedy. *Godb.* 285. 2 *Roll. Rep.* 312. 1 *Mod.* 286. In this laſt caſe, Twiſden ſaid, "I remember an action upon the caſe was brought, for that the defendant hath taken away his goods, and hidden them in ſuch ſecret places that the plaintiff could not come at them to take them in execution; and adjudged it could not lie."

What Actions Executors or Adminiſtrators may bring in Right of thoſe they repreſent.

An executor ſtands in the place of his teſtator, and repreſents him as to all his perſonal contracts, and therefore may regularly maintain any action in his right, which he himſelf might. *Cro. Eliz.* 377. *Latch.* 167. 1 *Roll. Abr.* 912. *Poph.* 189. 1 *Leon.* 193.

But

But it ſeems that executors could not at common law bring treſpaſs for a treſpaſs done to the teſtator; to remedy which, by the 4 *E.* 3. *c.* 7. reciting, That "whereas in times "paſt executors have not had actions for a treſpaſs done to "their teſtators, as of the goods and chattels of the ſame "teſtators carried away in their life, and ſo ſuch treſpaſſes "have hitherto remained unpuniſhed; it is enacted, that "executors in ſuch caſes ſhall have an action againſt the "treſpaſſers, and recover their damages in like manner as "they whoſe executors they be ſhould have had, if they "were in life."

It hath been adjudged, that an executor may have an action of debt upon the ſtatute 2 *E.* 6. againſt a defendant, for not ſetting out tithes in his teſtator's time, for though it is a tort done to his perſon, yet it is maintainable within the equity of this ſtatute. 1 *Vent.* 30.

Alſo it was holden, that at common law there was no remedy for a recovery of rent-arrear in the life-time of the teſtator; for the heir could not maintain an action of debt for it, becauſe he had nothing to do with the perſonal contracts of his anceſtor: nor the executor, becauſe he could not repreſent his teſtator as to any contracts relating to the freehold and inheritance; but this is remedied by the 32 *H.* 8. *cap.* 37. by which executors and adminiſtrators are enabled to ſue for and recover all ſuch arrears of rent. &c.

Of Advancing and bringing into Hotchpot.

By a cuſtom, which has prevailed time out of mind in certain places, where any children were reaſonably advanced by the *father* in his life-time, with any part of his goods, they ſhall have no farther ſhare; but yet ſuch child being only in part advanced, may bring ſuch advancement into Hotchpot, when he will be entitled to an equal ſhare with the reſt. *Co. Lit.* 176. *b.*

This advancement, that will exclude a child, muſt be by the father *only*, and muſt be given directly to the child, and not to another for the benefit of the child: and therefore money given to bind a child out an apprentice, or laid out in his education, is no advancement: nor will he be excluded if the father purchaſes for him an advowſon, &c. or buys him any office civil or military. *Swinb.* 217.

On the ſtatute 22 and 23 *Car.* 2. which expreſsly excludes every child advanced by the father, except the heir at law, from a farther ſhare, unleſs he brings ſuch advancement into

into Hotchpot; it has been held, that if the heir at law hath a ſettlement or proviſion made on him on his father's marriage, out of the perſonal eſtate, that upon the father's dying inteſtate, to intitle him to any more, he muſt bring ſuch advancement into Hotchpot. 1 *Vern.* 638.

If a father dies without any diſpoſition of a part of his perſonal eſtate, a child advanced by him in his life-time is not to bring in ſuch advancement into Hotchpot, in order to have a diſtributive ſhare of ſuch part, as he died inteſtate. *Preced. Chan.* 170.

EXTORTION. Is a taking money, &c. by a public officer by virtue of his office, either where it is not due, or more than is due, or before it is due. 1 *Hawk. P. C.* 170. The puniſhment at common law is by fine and impriſonment, and ſometimes a forfeiture of the office; and an action of treſpaſs *vi et armis* will lie. 11 *Mod.* 137.

By the ſtat. *Weſtm.* 1. 26. no ſheriff, nor other king's officer, ſhall take any reward to do his office on pain of yielding twice as much, and other puniſhment at the king's pleaſure.

F

FALSE IMPRISONMENT. If one be arreſted on a Sunday, unleſs it be for ſome treaſon, felony, or breach of the peace, it is falſe impriſonment as much as if it had been done without any writ, &c. 29 *Car.* 2. *c.* 7. *p.* 6.

Or, if a miniſter be arreſted by virtue of a civil proceſs, either in going to church, or in returning thence, on any day, it is falſe impriſonment. *Sheph.* 1208.

If a ſpecial bailiff upon arreſting a man does not ſhew his warrant upon a demand for that purpoſe, the arreſt is held to be a falſe impriſonment. But it is otherwiſe if he is a known and ſworn bailiff, for he is not obliged to ſhew his warrant. *Bro. Faux Impr. pl.* 23. 9 *Rep.* 69.

If a ſtranger aſſiſt a bailiff in confining a perſon, who has been arreſted by ſuch bailiff, this is not a falſe impriſonment. *Bro. Treſ. pl.* 402. 2 *Roll. Abr.* 561. *F. pl.* 2. *Cro. Car.* 446.

If a ſtranger, after a man has been arreſted, confines him at the requeſt of the bailiff who arreſted him, this is not a falſe

falſe impriſonment. 2 *Roll. Abr.* 561, *F. pl.* 2. *Cro. Car.* 446.

If a warrant is directed to two or more, *jointly* or *ſeverally*, an arreſt by either of them alone is legal. 1 *Inſt.* 181.

Wherever the arreſt of a man was at firſt legal, any detention of him afterwards amounts to a new caption, and is a falſe impriſonment. *Cro. Car.* 379.

If a plaintiff, by an order in writing, commands a ſheriff to diſcharge a man, whom he has arreſted by virtue of a *capias* or an *exigent* at his ſuit, and the ſheriff afterwards detains him, the detention is a falſe impriſonment. 3 *Bulſtr.* 97, 98. *Cro. Car.* 379. But it is no falſe impriſonment either in a ſheriff or gaoler, who detains a perſon 'till he pays his lawful fees. 2 *Inſt.* 53.

Every arreſt for a civil cauſe, which is not warranted by ſome writ or proceſs, is an unlawful reſtraint of liberty. 2 *Inſt.* 57.

If a man is unlawfully arreſted in the ſtreet, it is falſe impriſonment tho' he be not taken into any houſe. *Finch's Law.* 202. 22 *Aſſ. pl.* 85.

If a man is arreſted by virtue of a proceſs which has iſſued irregularly, this is a falſe impriſonment in the party at whoſe ſuit it iſſued; for it was incumbent on him to take care that it iſſued regularly, but it is not falſe impriſonment in the officer, for he has not been guilty of any offence but has done his duty in obeying the proceſs of a court to which he owed obedience. 2 *Jon.* 214. 1 *Vent.* 220. *Str.* 509.

But if the writ be iſſued *erroneouſly* only, it is not falſe impriſonment; becauſe the iſſuing thereof was owing to a miſtake of the court, and not to any fault of the party at whoſe ſuit it iſſued. *Str.* 509.

Upon a proceſs out of an inferior court, if the cauſe of action did not ariſe within the juriſdiction of the court out of which the proceſs iſſued, it is not falſe impriſonment either in the party ſuing, or the officer, and the only advantage ſuch a defendant has is to plead to the juriſdiction of the court. *Ld. Raym.* 230.

If one perſon be arreſted inſtead of another, it is falſe impriſonment. 1 *Bulſtr.* 149. *Moor* 457. *Hard.* 323.

Any perſon may without an expreſs warrant arreſt a man whom he ſees upon the point of committing a treaſon or felony. 2 *Hawk. P. C.* 77.

Any private perſon may without an expreſs warrant arreſt ſuch

ſuch perſons as are actually fighting; and ſtay them 'till their heat is over, and then deliver them to the conſtable, who may carry them to a juſtice, in order to their finding ſureties of the peace. 1 *Hawk. P. C.* 136. 2 *Hawk. P. C.* 81. 2 *Inſt.* 52. *Hales Pl. C.* 131. *Lamb.* 131. And if a man receive a hurt from either party by thus endeavouring to preſerve the peace, he ſhall have his remedy by an action againſt him; and it ſeems that the law would juſtify him if in thus doing he ſhould unavoidably hurt either party. 1 *Hawk.* 136. 3 *Inſt.* 138. *Dalt. c.* 8.

And it is ſaid the arreſting a perſon, who is coming to the aſſiſtance of one who is fighting, is not falſe impriſonment. 1 *Hawk. P. C.* 136.

Any perſon may without an expreſs warrant confine a man diſordered in his mind, who ſeems diſpoſed to injure either himſelf or another. *Idem. Pl.* 28. *Pl.* 25.

No perſon, not even a conſtable, can arreſt a night-walker, unleſs guilty of ſome diſorderly act. *Ld. Raym.* 1301.

If a conſtable after having arreſted a man under a warrant, ſuffers him to go at large, and afterwards retakes him by virtue of the ſame warrant, it is falſe impriſonment; but if the perſon in ſuch caſe voluntarily ſurrenders himſelf, tho' it is a doubtful point, yet it ſeems the better opinion that the conſtable may detain him, and carry him before a juſtice of the peace. 2 *Hawk. P. C.* 81.

Falſe impriſonment may be removed, and a ſatisfaction for it may be obtained. As to the *removal* of it, it may be by Habeas Corpus, and as to the *ſatisfaction*, this muſt be obtained by an action of treſpaſs and falſe impriſonment, wherein the party recovers damages for the injury he has received; and the defendant is, as for all other injuries committed with force, liable to pay a fine to the king. And if the party injured pleaſe he may indict him.

False Returns. An action on the caſe wherein damages ſhall be aſſeſſed by the jury, is the proper remedy for all falſe returns.

False *verdict*. The preſent practice of ſetting aſide verdicts is by motion in court. See Ministers *of juſtice*.

False *weights and meaſures*. Perſons guilty of ſelling by falſe weights or meaſures, may by indictment at common law be fined and impriſoned, tho' the better way is by levying on a ſummary conviction, by diſtreſs and ſale, the forfeiture impoſed by the ſtatute.

FAME. By the ſtat. 24 *Edw.* 3. *c.* 1. juſtices are empowered to bind over to the good behaviour, perſons haunting bawdy-houſes with women of bad fame; or for keeping ſuch women in his own houſe; or for words tending to ſcandalize the government, or in abuſe of the officers of juſtice, eſpecially in the execution of their office: alſo night-walkers; eaves-droppers; ſuch as keep ſuſpicious company, as are reported to be pilferers or robbers; ſuch as ſleep in the day, and wake in the night: common drunkards; whoremaſters; the putative fathers of baſtards; cheats; idle vagabonds; and other perſons, whoſe miſbehaviour may reaſonably bring them within the general words of the ſtatute, as perſons not of good fame. 4 *Black. Com.* 256.

FEES *of counſel.* A counſel can maintain no action for his fees, which are conſidered not as a ſalary or hire, but as a mere gratuity. 1 *Chan. Rep.* 38.

FELONY. Is in the general acceptation of the word every ſpecies of crime, which at the common law incurs the forfeiture of lands or goods. See COMPOUNDING *of felony.*

FEME-COVERT. See BARON and FEME.

FENCE. An action of treſpaſs lies for breaking down or taking away pales, poſts, hedges, fences and the like.

If a ſheriff who comes to make replevyn of the beaſt of A. which is impounded in the cloſe of B. breaks down the fence of the cloſe when he might have entered by the gate which was open, an action of treſpaſs lies. 2 *Roll. Abr.* 552. But if by the threats of B. the ſheriff apprehends his life would be in danger, if he went through the gate, it is lawful for him to break down the fence and enter that way. *Ibid.*

FERRYMAN. See CARRIER.

FIGHTING. See HOUSE.

FINDING. The finder of any thing, altho' he does not acquire by finding a *general* property therein, yet if a ſtranger converts it, he may bring an action of trover againſt him; becauſe as the finder is anſwerable for it to the perſon in whom the general property is, he has a *ſpecial* property therein; and he has moreover a right thereto againſt every one except the perſon who loſt it. *Str.* 505.

If a man having accidentally found any periſhable commodity and neglects to preſerve the ſame, no action lies; for the law has laid no duty on the finder, and therefore he cannot be

be anſwerable for a nonfeaſance in ſuch a caſe; as, if a man finds butter, and by his negligent keeping, it is ſpoilt, yet no action will lie. 1 *Leon.* 223. *Owen* 141. Or, if he finds garments, and for want of proper care they are moth-eaten. *Cro. Eliz.* 219. Or, if a man finds goods, and loſes them again, or if he finds a horſe and gives him no ſuſtenance. *Cro. Eliz.* 219. 2 *Bulſt.* 21. *cont.*

But tho' for a mere nonfeaſance, or neglect, he is not anſwerable, ſeeing he is not obliged to be charitable to a careleſs owner; yet if he makes gain or advantage of the thing he finds; or if he rides a horſe; or abuſes the thing he finds, as by putting paper into water, or if he kills ſheep he ſhall anſwer for them. 1 *Roll. Abr.* 5. 1 *Leon.* 224. *Cro. Eliz.* 219. *Stile* 261. 1 *Bulſt.* 38.

FIRE. By the 6*th Ann.* it is enacted, that no action, &c. ſhall be had, &c. againſt any perſon in whoſe houſe or chamber any fire ſhall accidentally begin, or any recompence be made by ſuch perſon for any damage, &c. provided that nothing contained in the act ſhall extend to defeat or make void any contract or agreement made between landlord and tenant. See ARSON and HOUSE.

FIRE-WORKS. See NUSANCES.

FISH. An action of treſpaſs *vi et armis*, lies for catching fiſh in a ſeveral fiſhery. 1 *Inſt.* 122. *Salk.* 637.

It has been laid down, that an action of treſpaſs does not lie againſt a ſtranger, for catching fiſh in a free fiſhery; for that as divers perſons have a right to fiſh therein, no one of them can maintain it againſt ſuch ſtranger. 1 *Inſt.* 122. *Cro. Car.* 554. But *Holt Ch. J.* and *Dolben J.* have in one caſe been of opinion, that any one having a right to fiſh in a free fiſhery, may maintain ſuch an action. But *Giles Eyre J.* was of a contrary opinion. *Salk.* 637. *Carth.* 286. *Reg.* 95.

An action does not lie for fiſhing in a river where the tide ebbs and flows; for the property of the ſoil of all ſuch rivers is in the king, and all perſons have *prima facie* a right to fiſh therein. 1 *Mod.* 105.

The owner of a ſeveral fiſhery may lawfully diſtrain nets found in his water, as nets doing damage; but if he cuts them an action of treſpaſs lies. *Cro. Car.* 228.

FORCE. The laws of England juſtifiy a woman, if ſhe kill one who attempts to raviſh her. 1 *Hawk. P. C.* 71. And an huſband or father for killing a man who attempts to raviſh his

his wife or daughter; but not if there be conſent and no force. 1 *Hal. P. C.* 485, 486. And it ſeems generally the complexion of our law to juſtify force againſt him who attempts to commit a capital offence. See TRESPASS and MARRIAGE.

FORETOOTH. See MAYHEM.

FORNICATION. See LEWDNESS.

FORTUNE-TELLERS. By the 9 *G.* 2. *c.* 5. no proſecution ſhall be carried on againſt any perſon for conjuration, witchcraft, ſorcery or inchantment. But notwithſtanding this ſtatute, perſons are puniſhable with a year's impriſonment and ſtanding in the pillory four times, who *pretend* to uſe witchcraft, tell fortunes, or diſcover ſtolen goods by ſkill in the occult ſciences.

FRAUDS. By the Common Law, all deceitful practices in defrauding or endeavouring to defraud another of his known right, by means of ſome artful deviſe, contrary to the plain rules of honeſty, are puniſhable according to the magnitude of the offence. *Co. Lit.* 3. *b. Dyer* 295.

As, if a man cauſe an illiterate perſon to execute a deed to his prejudice, by reading it over to him in words different from thoſe in which it was written. 1 *Sid.* 312.

Deeds and conveyances when obtained by fraud, are void: and deeds of gifts and grants of land fraudulently made to defeat purchaſers are void.

If a man conveys his land to friends in truſt, or to the uſe of a wife for her jointure, &c. to defraud a purchaſer or creditor; the truſt ſhall go in equity to the purchaſer or creditor, and he ſhall avoid the eſtate. 2 *Cro.* 158.

If a man makes an aſſignment of his leaſe, and yet keeps poſſeſſion of the land, the aſſignment ſhall be judged fraudulent.

A general gift of all a man's goods, may be reaſonably ſuſpected to be fraudulent, though there be a true debt owing to the party to whom it is made: And a deed of gift of all one's goods in ſatisfaction of a debt, is void againſt other creditors. The ſeveral marks of fraud in the grant of goods are. 1. If it be general, without exception of ſome things of neceſſity. 2. If the donor continues in poſſeſſion of, and uſe the goods. 3. If the gifts be made in ſecret. 4. If there be a truſt between the parties. 5. If made pending the action. 3 *Rep.* 81, 82.

The

The ſtatute 13 *Eliz.* makes the deed void againſt creditors, but not againſt the party himſelf, his executors or adminiſtrators.

Fraudulent conveyances in order to defraud purchaſers are void, as to ſuch purchaſers; and the perſons juſtifying or putting off ſuch grants as good, ſhall forfeit a year's value of the goods and chattels, and ſhall be impriſoned. 27 *Eliz. c.* 4.

A man may be indicted as a cheat who takes up goods, &c. under falſe pretences; but if the injured party delivers a bill to him he makes it a debt, and cannot proſecute him on the fraud.

An action on the caſe will lie for any injury occurring to a man in his real eſtate of freehold or inheritance; as if A. levies a fine, ſuffers a recovery, acknowledges a judgment, recognizance, ſtatute merchant or ſtaple in my name, I may have an action. 1 *Roll. Abr.* 100.

If a man razes the name of the obligor out of an obligation, and in the room of it inſerts the name of J. S. and after ſues him upon this obligation, J. S. may have an action on the caſe. 1 *Roll. Abr.* 100.

Such an action alſo lies for cheating by playing with falſe dice. 1 *Roll. Abr.* 100. *Cro. Eliz.* 90. *Co. Ent.* 8. *F. N. B.* 95. *Moor* 776. See CHEAT and SALE.

G

GAMING. Gaming is at preſent a very abandoned and deſtructive employment in high life, and made ſtill more pernicious by the ill uſe made of it by ſharpers, which has conſtituted gaming-houſes common nuſances.

Gaming-houſes, may, by indictment at common law, be ſuppreſſed and the perſons keeping them fined. 1 *Hawk. P. C.* 198. 225. And both ſuch and the gameſters are liable to penalties by ſtatute 33 *H.* 8. Alſo perſons having no viſible eſtates, not making it appear that the principal part of their maintenance is got by other means than by gaming, are to be bound to their good behaviour. The ſtatute 16 *Car.* 2. *c.* 7. gives treble damages againſt any perſon who ſhall cheat at cards, dice, &c. And alſo enacts, that if any perſon by playing or betting, not for ready money, ſhall loſe 100l. or more, his ſecurity taken for it ſhall be void; and the winner forfeit treble the value, one moiety to the king, the other to

the informer. A watch may be loſt at gaming, which is convertible to ready money, and not be within the ſtatute; which reſtrains ſuch playing only as puts people in debt. Action of debt was brought for 100 l. upon a horſe match, and in the articles another 100 l. was articled to be run for, if the plaintiff required it; and it was adjudged within the ſtatute againſt gaming. Where ſecurity is given for money won at gaming to a third perſon, not being privy to it, or not knowing it was won at play; it is not within the ſtatute. 1 *Lill.* 645. 1 *Lev.* 94, 244. 1 *Vent.* 253. 2 *Mod.* 297.

By the 9 *Ann. c.* 14. ſecurities for money won at play, are to be void; and if any perſon ſhall loſe by gaming at one time 10 l. he may recover the ſame from the winner, by action of debt; and perſons winning at one time 10 l. by fraud, may be indicted, and ſhall forfeit five times the value, be deemed infamous, and ſuffer ſuch corporeal puniſhment as in caſe of wilful perjury. And by the 18 *G.* 2. *c.* 34. the forfeitures of the 9 *Ann.* may be recovered in a court of equity; and moreover, if a man be convicted upon information or indictment, of winning or loſing at any ſitting 10 l. or 20 l. within twenty-four hours, he ſhall forfeit five times the ſum.

It ſeems the better opinion that an action of general *indebitatus aſſumpſit* will not lie for money won at play, for the contract is executory, and but a wager, which is but a collateral promiſe; and this action will not lie, unleſs on a contract executed, ſuch as labour done, or ſome other meritorious cauſe. *Ld. Raym.* 69, 89. 6 *Mod.* 128. But if the money be ſtaked down the inſtant that the game is determined, the property is veſted in the winner, and it is as much a violation of his right to with-hold it from him, as it would be if he had come to it by any other means. 5 *Mod.* 13.

An action of *indebitatus aſſumpſit* lies againſt him who holds the wager, becauſe it is a promiſe in law to deliver it if won. 5 *Mod.* 13.

It is agreed that a perſon who wins money at gaming may maintain an action of ſpecial *indebitatus aſſumpſit.* 3 *Lev.* 118. 6 *Mod.* 128. 5 *Mod.* 13. 1 *Vent.* 175. See COVENANT.

GARDEN. An action of treſpaſs lies for damaging or deſtroying fruit, ſhrubs or trees in a garden.

GATES. See NUSANCE.

GIFT. A true and proper gift is always accompanied with delivery of poſſeſſion, and takes effect immediately: and then it is not in the power of the giver to retract it, tho' he did it without any recompenſe. *Jenk.* 109. unleſs it be prejudicial to creditors; or the giver were under any legal incapacity, as infancy, coverture, dureſs, or the like; or if he were drawn in, circumvented, or impoſed upon, by falſe pretences, drunkenneſs, or ſurpriſe. But if the gift does not take effect, by delivery of immediate poſſeſſion, it is then not properly a *gift*, but a *contract*: and this a man cannot be compelled to perform, but upon good and ſufficient conſiderations. 2 *Bl. Com.* 441.

GOODS. An action of treſpaſs lies for the taking of any goods, although theſe are afterwards retaken by, or reſtored to the owner: But it is reaſonable, that ſuch retaking or reſtoring ſhould go in mitigation of damages. *Bro. Treſp. pl.* 221. 2 *Roll. Abr.* 569. See SALE.

GOVERNMENT. Contempt againſt the king's perſon and government, by ſpeaking or writing againſt them, curſing or wiſhing them ill, giving out ſcandalous tales concerning the king, or doing ſuch things as tend to leſſen his authority, or to raiſe jealouſies between him and his people, are puniſhable upon indictment with fine, impriſonment, the pillory, or other corporeal puniſhment. 1 *Hawk. P. C.* 60.

GRAVESTONE. An action of treſpaſs *vi et armis* lies againſt a parſon for taking a graveſtone or coat of arms out of his own church; for neither of theſe is to be conſidered as an oblation. *Bro. Treſp. pl.* 181. See CORPS.

GROUND, *treſpaſſing in.* See LAND.

H

HALF-BLOOD. See DESCENT.

HAND. See MAYHEM.

HAND-WRITING. See EVIDENCE.

HANGING. If a man condemned to be hanged, come to life after he be hanged, he ought to be hanged again, for judgment is not executed 'till he is dead. 2 *Hawk.* 463.

HARE. See BEAST.

HEALTH. If a man, by improper practices, injures another's health, an action of treſpaſs on the caſe will lie againſt him,

as by ſelling him bad proviſions or wine. 1 *Roll. Abr.* 90. by the exerciſe of a noiſome trade, which affects the air in his neighbourhood. 9 *Rep.* 57. *Hutt.* 135. or by the neglect or unſkilful management of his phyſician, ſurgeon or apothecary.

HEARSAY. See EVIDENCE.

HEIRS. Heir is one that ſucceeds by deſcent and right of blood to any eſtate of inheritance, in lands, tenements, and hereditaments. See APPARENT.

The heir is favoured at common law; for according to this the anceſtor could not convey away his lands by will from his heir at law, without his conſent. 2 *Lill.* 11. But by the ſtatute 32 *H.* 8. the law is altered in that point. —Dubious words in a will ought to be interpreted for the benefit of the heir; and not to diſinherit him. An heir ſhall enforce the adminiſtrator to pay debts with the perſonal eſtate to preſerve the inheritance. *Chanc. Rep.* 280, 297. The heir is not bound in the bond of his anceſtor, unleſs expreſsly bound; and if a man binds his heirs, but not himſelf, the bond is void. 2 *Saund.* 136. A man ſhall never bind his heir to warranty, where he himſelf was not bound. A grant of an annuity muſt be for a man and his heirs, to bind the heir, although there be aſſets; and an heir ſhall not be bound, though named, except there be aſſets. 1 *Inſt.* 144.

The heir at law is preferred in chancery in a doubtful caſe. *Chanc. Rep.* 7. If an heir hath aſſets, and the executor alſo, it is at an obligee's election to have debt againſt the one or the other; but he ſhall not charge them doubly. 2 *Plowd.* 433. And where the heir is ſued for the debt of his anceſtor, and pays it, he ſhall be reimburſed by the executor of the obligor, who hath perſonal aſſets. 1 *Chanc. Rep.* 74. Heirs and executors, are both chargeable upon ſpecialties. *Dyer* 303. Where *Ceſtuique truſt* dies, leaving a truſt in fee ſimple to deſcend to the heir; this truſt will be aſſets by deſcent in the heir's hands, and be liable to the obligation of his anceſtors. 29 *Car.* 2. And if an heir has made over lands fallen to him by deſcent, execution is to be had againſt him, to the value of the land. &c. 4 *and* 5 *W. and M.*

When a man recovers againſt an heir, by default or verdict, on pleading *riens per deſcent*, the plaintiff may enter a ſpecial judgment *de terris diſcenſis*; and the plaintiff will have all the lands by deſcent in execution: but if the judgment be general, he can have only a moiety by *elegit*. *Davis* 439.

2 *Leon.* 16. The judgment and execution ſhall be general, if the heir acknowledges the action, and ſhews that he hath ſo much by deſcent; but if he will not ſhew what he hath by deſcent, he loſes the benefit of the law. Special matter may be given in evidence, on *riens per deſcent*, as that the ſale was fraudulent, &c. *Mich.* 1. *W. and M. B. R. Cro. Eliz.* 692. *Moor* 681. 5 *Rep.* 60.

At the common law a man cannot be heir to goods and chattels; but by cuſtom, heir-looms go to the heir, though houſehold goods. Theſe are not deviſable by teſtament; the law prefers the cuſtom before a deviſe, which takes not effect 'till the teſtator's death, and then they are veſted in the heir by the cuſtom. But ſale in a man's life-time, would make it otherwiſe. 1 *Inſt.* 28, 18, 185. See DESCENT, EXECUTORS, and FORCE.

HIGHWAY. If a perſon lays logs of wood or other incumbrances in the highway, and a perſon riding ſtumbles over them and is hurt, an action on the caſe will lie againſt him, becauſe of the ſpecial damage; and ſuch perſon may be indicted for it as a public nuſance: and if it is a cuſtom for the inhabitants to lay ſuch logs before their doors, it is void in law. *Cro. Jac.* 446. 1 *Salk.* 15. But if a perſon is only delayed in his journey a little while, by reaſon of which he is damnified, or ſome important affair is neglected; this is not ſuch a ſpecial damage, for which a private action on the caſe will lie; but a particular damage, to maintain this action, ought to be *direct* and not conſequential; as, for inſtance, the loſs of his horſe, or ſome corporeal hurt in falling into a trench in the highway, &c. *Carth.* 194.

A ſtreet in a city is a highway, to be repaired by ſuch city; ſurveyors may turn a water-courſe, or dig gravel in any ground contiguous to the highway, filling up the pit.

HOGS. The keeping of hogs in any city or market town is indictable as a public nuſance. *Salk.* 460. See NUSANCE.

HOLDING OVER. By the ſtatutes 4 *Geo.* 2. *c.* 28. *and* 11 *Geo.* 2. *c.* 19. in caſe after the determination of any term of life, lives, or years, any perſon ſhall wilfully hold over the ſame, the leſſor is entitled to recover by action of debt, either a rent of double the annual value of the premiſes, in caſe he himſelf hath demanded and given notice in writing to deliver the poſſeſſion; or elſe double the uſual rent, in caſe the notice of quitting proceeds from any tenant having power to

determine his leaſe, and he afterwards neglects to carry it into due execution.

HOMICIDE. Is the killing of any human being; and is of three ſorts; *juſtifiable*, *excuſable*, and *felonious*. The firſt is ſuch as is owing to unavoidable *neceſſity*, without any previous intention, negligence or inadvertence, and is conſequently blameleſs. As, where an officer in the execution of his office, kills a perſon that aſſaults or reſiſts him. 1 *Hawk. P. C.* 71. Or where a perſon attempting to rob, murder, or raviſh another, ſhall be killed in ſuch attempt. The ſecond, or *excuſable homicide*, is divided into, 1. Homicide *by miſadventure*, as where a man doing *a lawful act*, without any ill intention, kills another; as where a man being at work, or doing any lawful act, does by ſome inſtrument or otherwiſe kill another. And where one whips another's horſe, whereby he runs over another and kills him, it is held accidental in the rider, becauſe he was doing nothing unlawful; but as the perſon who whipped the horſe, in ſo doing committed an unlawful act, it is manſlaughter in him. 1 *Hawk. P. C.* 73. And in general, if death enſues in conſequence of an idle, dangerous, and unlawful ſport, as ſhooting or caſting ſtones in a town or the like, the ſlayer is guilty of manſlaughter, and not of miſadventure only. *Ibid.* 74. 2. Homicide *in ſelf-defence*, or *chance-medley*, is diſtinguiſhed from juſtifiable homicide in this reſpect, that *that* is done in hindering the commiſſion of a capital crime, but *this* is done by one in the courſe of a ſudden affray, brawl, or quarrel, by killing the perſon who aſſaulted him: the true difference between this ſpecies of homicide and manſlaughter is this, that if both parties are actually combating at the time when the mortal ſtroke is given, the ſlayer is guilty of manſlaughter; but if the ſlayer hath not begun to fight, or (having begun) endeavours to decline any further ſtruggle, and afterwards, being cloſely preſſed by his antagoniſt, kills him to avoid his own deſtruction, this is homicide excuſable by ſelf-defence. *Foſt.* 277. The third is *felonious homicide*, which is the wilful and malicious killing of any human being, of malice prepenſed.

HORSES. If A. hires a horſe of B. and neglects to pay the hire an action on the caſe lies againſt him.

If A. hires a horſe of B. and gives earneſt for the horſe and he is promiſed that it ſhall be delivered to him by ſuch time

time, and B. then refuſes to deliver him, whereby A. is diſappointed, an action on the caſe lies againſt B.

If A. hires B. to carry a load of timber from one town to another to be unloaded there, at ſuch a place as A. ſhould appoint, and B. gives notice to A. that he will bring it ſuch a day, and requeſts him to appoint a place where he ſhall lay it, and he brings it accordingly, but A. will not appoint, &c. ſo that the horſes are kept ſo long in the cart that they being hot with carrying the timber, catch cold and die; yet B. ſhall have no action againſt A. for he might have taken his horſes out of the cart and walked them, or put them in a ſtable, or if A. would not have appointed a place, as ſoon as he came there he might have unloaded in any convenient place, ſo that the injury the horſes received was through his own default. 2 *Lev.* 196. 1 *Vent.* 310. 3 *Keb.* 766.

If a man lend or hire another's horſe, and for want of ſafe keeping the horſe dies, the owner may have an action on the caſe, to repair the damage ſuſtained by the negligence of the borrower.

If a ſmith refuſes to ſhoe my horſe, or if he pricks him, an action on the caſe lies againſt him. 1 *Roll. Abr.* 91. *Keilw.* 50. 1 *Sand.* 312.

If a common farrier kills my horſe with bad medicines, or by neglect in curing of him, an action on the caſe lies without any expreſs promiſe to cure him. 1 *Roll. Abr.* 10, 91. 19 *H.* 6. 49.

An action on the caſe lies where a man lends another a horſe who puts him into a ruinous ſtable, that tumbles upon him and kills him; or if he over-rides a horſe, lent or hired to him; but if the ſtable fall by a violent tempeſt, or the horſe dies of any diſeaſe, the hirer or borrower are excuſed. *Cro. Eliz.* 777. 784. *Owen.* 52. 5 *Co.* 14. *Dyer* 121. *Godb.* 78. *Doct. and Stud.* 128. 1 *Lutw.* 98.

If A. rides an unruly horſe in Lincoln's-inn-fields (being a place much frequented by the king's ſubjects, and unfit for ſuch purpoſe) to break and tame him, and the horſe breaks from A. and runs over B. and grievouſly hurts him, &c. B. may have an action againſt A. for though the miſchief was done againſt the will of A. yet ſince it was his fault to bring a wild horſe into ſuch a place where miſchief might probably enſue, A. muſt anſwer for the conſequence of ſo ill an act. 1 *Vent.* 295. 2 *Lev.* 172. 3 *Keb.* 65. 1 *Lutw.* 90.

HOTCHPOT. See EXECUTORS.

House. It is in general true, that an action of treſpaſs lies for the going into any houſe, altho' the door was open; for the houſe of every man is his caſtle; and he is not obliged to keep his door ſhut. *Plowd.* 71. 2 *Roll. Rep.* 208.

If a mother goes into a houſe, the door of which is open, to ſee her daughter, a ſervant in the houſe, who is ſick, an action of treſpaſs lies. 2 *Roll. Abr.* 567.

If a beaſt in being driven thro' a ſtreet goes into a houſe, the door of which is open, an action of treſpaſs lies. 10 *E.* 4. 7. *B. pl.* 19.

If a man, whoſe term in a houſe is expired, goes into it when the door is open, to take away any goods which he has left there, an action of treſpaſs lies; for it was his own folly to leave them there. *Bro. Treſp. pl.* 430.

But if J. S. has injuriouſly got any of the goods of J. N. into his houſe, it is lawful for J. N. to go thereinto, the door being open, and take thoſe goods: becauſe J. S. was himſelf the wrong doer. *Cro. Eliz.* 246. 2 *Roll. Rep.* 56.

It is not lawful for J. S. to go into the houſe of J. N. the door being open, to ſearch for any goods which he has loſt; altho' it is commonly reported, that theſe goods are in the houſe of J. N. 2 *Roll. Rep.* 55, 56. But if any of the goods of J. S. have been ſtolen, it is lawful for J. S. to go into this houſe, the door being open, to take them. 2 *Roll. Rep.* 55, 56.

It is lawful for him, in whom the reverſion of a houſe is, to go into it, the door being open, to ſee if any waſte has been done *Bro. Treſp. pl.* 16.

If J. S. goes into the houſe of J. N. the door being open, to tender money, of which a tender to the perſon of J. N. is neceſſary, an action does not lie. *Plowd.* 71.

It is lawful for any man to go into a houſe, the door being open, to part two who are fighting, becauſe this is for the public good. *Keilw.* 46.

It is in general true, that if a ſheriff breaks open the door of a houſe, this action lies. 5 *Rep.* 91. 3 *Inſt.* 162. *Cro. Jac.* 556.

And if a barn or an outhouſe is adjoining to or parcel of a houſe, the privilege of the houſe extends to both theſe. 1 *Ibid.* 186. 1 *Keb.* 698. But not if at a diſtance from the houſe. *Ibid.*

This privilege extends however only to the houſe in which a man lives, for if the goods of J. S. are, to prevent their being taken in execution, carried into the houſe of J. N. the

the ſheriff may, after having in vain demanded to have the door of the houſe opened, break it open in order to come at theſe goods. 5 *Rep.* 93.

Wherever the king is a party, it is lawful for a ſheriff to break open the door of a man's houſe, either to arreſt him, or to execute a proceſs: But he ought before he do this, to declare the cauſe of his coming, and make a demand to have the door opened. 5 *Rep.* 91. 4 *Leon.* 41.

And in like manner a ſheriff may after requeſt break open the door of a houſe to execute a writ of *habere facias ſeiſinam*, or of *habere facias poſſeſſionem*, even at the ſuit of a private perſon; for after the judgment, on which either of theſe is founded, the houſe is no longer to be conſidered as the houſe of the perſon who is in poſſeſſion thereof. 5 *Rep.* 91.

And ſo he may to arreſt a perſon on a commiſſion of rebellion after requeſt made. *Crompt.* 47.

If a man who has been arreſted eſcapes into any houſe, it is lawful for the ſheriff, after demand to have it opened, to break open the door thereof in order to retake him. 5 *Rep.* 93. 2 *Roll. Rep.* 138. *Palm.* 54. Accordingly it has been adjudged that if a bailiff lays hold of one by the hand (whom he has a warrant to arreſt) as he holds it out of the window, this is ſuch a taking of him, that the bailiff may juſtify the breaking open of the houſe to carry him away. 1 *Ventr.* 306. 6 *Mod.* 173.

When a ſheriff has entered into a houſe in order to execute a writ of *fieri facias*, it is lawful for him, after demand made, to break open any chamber-door or trunk. 2 *Sho.* 87. *Palm.* 54. And it ſeems reaſonable, that it ſhould in ſuch caſe be lawful for the ſheriff, after a demand to have it opened has been in vain made, to break open the door of any barn or outhouſe, which is adjoining to or parcel of the houſe. 5 *N. Abr.* 178. And if a ſheriff's officer has entered a houſe, in order to execute a *fieri facias*, the maſter of the houſe locks the door, it is lawful for the ſheriff, after a demand to have it opened has been in vain made, to break it open, in order to ſet the officer at liberty and compleat the execution. *Cro. Jac.* 556.

By the 21 *Jac. c.* 19. perſons under the commiſſioner's warrant may break open the houſe, chambers, ſhops, warehouſes, trunks, &c. of a bankrupt where his goods are reputed to be.

If

If a conſtable, who has the warrant of a juſtice of the peace to arreſt a man in order to his finding ſurety for his good behaviour, breaks open the door of any houſe in which he is, (after a demand to have it opened) in order to arreſt him, an action of treſpaſs does not lie. 5 *Rep.* 93. *Moor* 606.

If a conſtable has the warrant of a juſtice, for levying upon the goods of J. S. the penalty of a ſtatute, part of which is given to the king, it is lawful for him, after a demand to have it opened has been in vain made, to break open the door of a houſe in order to execute this. 3 *Jon.* 133, 134.

If an affray in a houſe is ſeen or heard by a conſtable, it is lawful for him, after a demand made, to break open the door of this houſe in order to arreſt the affrayers. 2 *Hawk. P. C.* 86.

If a perſon, who has in the preſence of a conſtable made an affray, flies into a houſe, it is lawful for the conſtable, after demand made, to have it opened, to break open the door in order to arreſt him. *Ibid.*

It is lawful for any perſon, after a demand to have it opened has been in vain made, to break open the door of a houſe, in order to arreſt a perſon who is juſtly ſuſpected of having committed a felony, for the public good requires it. *Ibid.*

If J. S. who is unlawfully confined by J. N. in his houſe, in order to regain his liberty breaks open the door, he is not liable to an action: becauſe J. N. was himſelf guilty of the firſt wrong. *Bro. Treſp. pl.* 186. 2 *Leon.* 202.

If J. S. by his negligence ſuffers his houſe to be on fire, it is lawful for the perſon who lives in an adjoining houſe to pull down the houſe of J. S. in order to preſerve his own. *Bro. Treſp. pl.* 186.

An action does not lie for pulling down a houſe, the erection of which is a nuſance in the highway. *Comb.* 417.

An action lies againſt a tenant at will, who commits waſte by pulling down houſes.

HOYMAN. See CARRIER.

HUNTING. See LAND.

HUSBAND AND WIFE. See BARON and FEME, PLAINTIFF, DEFENDANT, and CRIMINAL CONVERSATION.

I.

JACTITATION. If one boasts or gives out that he or she is married to such a person, whereby a common reputation of their matrimony may ensue, the party thus offending may be libelled in the spiritual court; and, unless the defendant undertakes and makes out a proof of the actual marriage, he or she is enjoined perpetual silence, which is the only remedy the spiritual court gives.

IDIOTS. An idiot is a person that has been a fool from his birth, of whose lands the king shall have the care and custody; but if a man had once understanding, and afterwards became a fool by chance or misfortune, the king shall not have the custody of him. 4 *Rep.* 124.

Deeds, grants, &c. made by an idiot are voidable, i. e. may be made void; and the king may avoid a deed of grant for the benefit of the idiot. As idiots are *non compos mentis*, they cannot make a will; but what they do concerning lands, &c. in a court of record, shall bind themselves, and all others claiming under them. An idiot may contract matrimony, and it shall bind him; otherwise many would pretend to be fools to be unmarried. Idiots, as well as lunatics, ought not to be prosecuted for committing any crime, as they want understanding to distinguish between good and evil. *Lit.* 405. 1 *Inst.* 247. 5 *Rep.* 111, 124. 2 *Inst.* 483. 1 *Roll. Abr.* 357. 1 *Inst.* 247. 3 *Inst.* 4, 108.

An idiot shall be bound to pay for necessaries, in the same manner as an infant. He cannot appear by attorney, and when he sues or defends any action, he must appear in person, and the suit is to be in his name, but followed by others. If an heir is an idiot, though of any age, any man may make a tender for him. Upon a writ returnable in chancery, an idiot may be examined whether he be so or not, and there is a writ *idiota inquirendo vel examinando* directed to the sheriff to call before him the party represented to be an idiot, and examine him, and enquire by a jury whether he be of sufficient understanding to manage his estate, and to certify the same into chancery; and he may be afterwards examined by the Lord Chancellor. 2 *Sid.* 112, 335. 1 *Inst.* 206. 9 *Rep.* 31. *F. N. B.* 232, 233.

IDLENESS.

IDLENESS. By the 17 *Geo.* 2. *c.* 5. idle and diſorderly perſons are puniſhable with a month's impriſonment in the houſe of correction.

IGNORANCE. Ignorance of the law will not excuſe: but if a perſon about to do a lawful act, thro' miſtake or ignorance does an unlawful act, he is excuſed, for his will and the deed did not go hand in hand which is neceſſary to conſtitute an act morally evil. Thus if a man, intending to kill a thief in his houſe, by miſtake kills an innocent perſon, this is no criminal action. *Cro. Car.* 538. but if a man thinks he has a right to kill a perſon excommunicated or outlawed, and does ſo, this is murder, for his ignorance of the law will not excuſe him.

IMPRISONMENT, *falſe*. See FALSE IMPRISONMENT.

INCLOSURE. If a man that ought to incloſe againſt my land neglects to do it, by which the cattle of his tenants enter into my land and do me damage, I may have an action on the caſe againſt him. 1 *Roll. Abr.* 105.

INDECENCY. See LEWDNESS.

INDORSEMENTS. See BILL OF EXCHANGE.

INFAMOUS *witneſs*. See EVIDENCE.

INFANTS. An infant is a perſon under the age of twenty-one years; before which age, acts done by infants may be avoided; as to matters of fact, either within age, or at full age; but as to matters of record, only during his minority. But an infant may bind himſelf to pay for neceſſaries, as meat, drink, apparel, &c. though not by bond, with penalty. He may give a bill for the very ſum due; but not make up an account with his creditor. An infant is not obliged to pay for cloaths, unleſs it be averred they were for his own wearing, and that they were convenient and neceſſary for him to wear, according to his eſtate. 1 *Inſt.* 171, 380. 2 *Inſt.* 483. 1 *Roll. Abr.* 729. *Cro. Jac.* 560.

An infant may purchaſe, it being intended for his benefit: but at his full age he may either agree to and confirm it, or wave and diſagree to it; and if he agree not when at age, his heirs after him may diſagree. All gifts, grants, &c. of an infant which do not take effect by delivery of his hands are void; and if made to take effect by delivery of his own hand, are voidable by himſelf, or his heirs, and thoſe which ſhall have his eſtate. Where an infant makes a deed, and delivers it within age, and afterwards delivers it again at

at full age, this ſecond delivery and deed are void; for the deed muſt take effect from the firſt delivery: ſo of a will for lands. But if an infant makes a leaſe, paying rent, and after his coming of age he accepts the rent, the voidable leaſe is made good. 1 *Inſt.* 2, 172. 8 *Rep.* 43. 3 *Rep.* 35. *Cro. Jac.* 320.

An infant may voluntarily bind himſelf as an apprentice, and continuing ſeven years, have the benefit of his trade; but a bond for his ſervice ſhall not bind him, tho' if he miſbehaves, his maſter may correct him, or complain to a juſtice of peace, and have him puniſhed. If an infant enters into a bond, pretending to be of full age, tho' he may avoid it by pleading non-age, he may be indicted for a cheat.

Infants, under the age of fourteen years, are not generally puniſhable for crimes; but if they are of that age, which is the age of diſcretion, or under thoſe years, having maturity of direction, they may be puniſhed as felons; though execution of theſe for felony is oftentimes reſpited, in order to a pardon. If an infant, &c. commit a treſpaſs againſt the perſon, or poſſeſſion of another, he muſt anſwer for the damage in a civil action. *Cro. Car.* 179. 3 *Leon. Ca.* 192. *Cro. El.* 254. 1 *Inſt.* 247. *Dr. and Stud. c.* 26. *Hob.* 134. 2 *Roll. Abr.* 547.

Where the defendant is an infant, the plaintiff ſhall have ſix years to bring his action in, after the defendant comes of age. If the plaintiff be an infant, he hath ſix years likewiſe after his age, to ſue by the ſtatute of limitations.

Carnally knowing a woman child under ten years old, whether with or without her conſent, is felony *ſans* clergy. 18 *Eliz. c.* 7. See BOND.

INGROSSERS. Are perſons who buy large quantities of corn, grain, butter, cheeſe, or other dead victuals, with intent to ſell the ſame again, which puts it in his power to ſell the ſame at his own price: and this being injurious to the public is an offence at common law, and is puniſhable with a directionary fine and impriſonment. 1 *Hawk. P. C.* 235. N. B. All the ſtatutes concerning ingroſſers, &c. were repealed by the 12 *G.* 3. *c.* 71.

INJURY. See BOND, MILL, PASTURE and SCHOOL.

INTEREST. See USURY.

INVENTORY. See EXECUTORS.

INNKEEPERS. If innkeepers refuſe either to receive a traveller as a gueſt into his houſe, or to find him victuals or lodging, upon

upon his tendering a reaſonable price for the ſame, he is not only liable to render damages for the injury, in an action on the caſe, but may be alſo indicted and fined. 1 *Hawk.* 225.

If his houſe is full he has a reaſonable excuſe, but if he refuſe them admittance under this pretence, and it be falſe, an action on the caſe lies. *Roll. Abr.* 3. *Dyer* 158.

Innkeepers may detain the goods of gueſts 'till their reckoning is paid. 1 *Salk.* 388. but if he lets them depart without payment, he has waved this advantage, and cannot afterwards ſeize them. He may alſo detain the perſon of his gueſts who eat, or the horſes which eat 'till payment. *Bac. Abr. Inns. D.*

In London and Exeter, if a perſon brings his horſe to an inn and leaves him there, the innkeeper may keep him 'till the owner pay for the keeping, and if he eat as much as he is worth, the maſter of the inn, after a reaſonable appraiſement, may ſell the horſe and pay himſelf, or may ſell him as his own, on the reaſonable appraiſement of four of his neighbours. *Yelv.* 66. N. B. In ſuch a caſe as this it would not be amiſs if the owner was known to ſend him a formal notice, or if unknown to advertiſe it.

But if one bring ſeveral horſes to an inn, and afterwards takes them all away but one, this horſe cannot be ſold for the debt of the others, but every horſe for his own proper debt. 1 *Bulſt.* 207.

And it ſeems where a horſe has been ſeveral times at an inn, and the owner is indebted for his food, the horſe cannot be detained at any one time for what was due before. *Str.* 557.

Innkeepers are liable to an action on the caſe for the goods of gueſts (being travellers) ſtolen out of their inns. *Dyer* 266. *Noy.* 79. *Latch.* 179. 2 *Brownl.* 214. 8 *Co.* 32. 6. *Roll. Abr.* 3. But if a man by ſpecial agreement boards or ſojourns at an inn and is robbed, the hoſt ſhall not be anſwerable to him. *Latch.* 127. *Hetley* 49.

And if the hoſt deſires his gueſt to put his goods in ſuch chamber under lock and key, and that then he will warrant their ſafety, or elſe not, and the gueſt notwithſtanding ſuffers them to lie in an other court, and they are ſtolen, no action lies againſt the hoſt. *Dyer* 266. Yet ſee *More* 7 where it ſeems to be held otherwiſe.

But it is clear that if the hoſt delivers the key of the chamber where the goods are, to the gueſt, and he leaves the door open and the goods are ſtolen, yet an action lies againſt the hoſt, for he is at his peril to take care of them. 8 *Co.* 33. *a.*

It ſeems the hoſt is anſwerable, tho' the gueſt does not acquaint him what goods, &c. he has. 8 *Co.* 33. *a.* But it is ſaid if an hoſt demands ſuch an account of the goods, and he tells him he has more, or leſs than he has, and they are loſt, the hoſt is not anſwerable. *Moor.* 158.

INROLLMENT. If the proper officer refuſes to inroll a bargain and ſale, an action on the caſe lies againſt him. 1 *Sid.* 209. 2 *Bulſt.* 336.

JOINTURE. A jointure is a ſettlement of lands and tenements made to a woman, in conſideration of marriage, and in lieu of dower.

Jointure made after the marriage may be avoided by the wife, and ſhe may chuſe her dower: but ſhe cannot if made before marriage.

After the death of the huſband, the wife may enter into her jointure, and is not driven to a real action, as ſhe is to recover dower at common law. Nor ſhall her jointure be forfeited by the treaſon of her huſband, as in caſe of dower. 1 *Inſt.* 36, 37.

Of all things whereof a woman ſhall be endowed, ſhe may have a jointure. But married women committing crimes, may incur forfeitures of their jointures; and being convicted of recuſancy, forfeit two parts in three of their jointure and dower. 1 *Inſt.* 46, 351. 3 *Jac.* 1. *c.* 4.

JUDGE. No judge ſhall be excepted againſt or challenged on a trial as jurors may; nor ſhall he have an action brought againſt him for what he does in virtue of his office. 1 *Inſt.* 294. 2 *Inſt.* 422.

To kill a judge of either bench, or of aſſize, &c. in their places adminiſtring juſtice, is treaſon. 25 *E.* 3. *c.* 2. And drawing a weapon only upon a judge, in any of the courts of juſtice, is conſidered in ſo heinous a light as to ſubject the offender to the loſs of his right hand, a forfeiture of his lands and goods, and perpetual impriſonment. 2 *Inſt.* 549.

And perſons uſing threatening or reproachful words to any judge ſitting in the courts, have been puniſhed with large fines, impriſonment, and other corporeal puniſhment. *Cro. Car.* 503. See MAGISTRATES.

JUDGMENT.

JUDGMENT. Where one has a ſum of money aſſeſſed for his damages in any action by the ſolemn determination of a court of juſtice, he may have an action of debt; for the damages which were before uncertain are now reduced to a certainty by the determination of the court. 43 *Eliz. c.* 3. *ſ.* 2. and 1 *Roll. Abr.* 600, 601.

Action of debt alſo lies in the Marſhalſea or any other courts upon judgments in the courts of king's bench and common pleas, and upon *nul tiel record* pleaded, the iſſue ſhall be tried by *certiorari and mittimus* out of chancery. 1 *Salk.* 209. but it ſeems to have been held otherwiſe. 439.

If a judgment is recovered jointly againſt three defendants, the plaintiff cannot bring an action of debt upon that judgment againſt one alone. 2 *Leon.* 220. And it may not be amiſs here to obſerve, that a difference has been held between an execution iſſued upon a judgment, and an action of debt upon ſuch judgment; that the former may be had upon a voidable judgment, and will be valid 'till the judgment is reverſed, and in the latter the plaintiff cannot recover unleſs he has good ground for his action. 1 *Leon.* 82.

By the 2 *Ann. c.* 4. 5 *Ann. c.* 18. and 6 *Ann. c.* 35. judgments, ſtatutes, recognizances, &c. ſhall not affect lands in (the eaſt and weſt ridings of the) county of York, unleſs they are regiſtred, &c. And by the 7*th Ann. c.* 20. ſtatutes, recognizances or judgments, ſhall not bind lands, &c. in Middleſex, unleſs entered in the new public regiſter office, &c.

There may be a ſtay or arreſt of judgment for want of notice of trial; where the plaintiff before the trial treated the jury; where the record differs from the deed pleaded; for ſome material defect in pleading, &c. And all matters of fact in theſe caſes muſt be verified by affidavits. 2 *Lill.* 93.

K.

KIDNAPPING. This is the forcible ſtealing away of man, woman or child, from their own country, and ſending them into another, and is puniſhable at the common law with fine impriſonment, and the pillory. *Raym.* 474. 2 *Show.* 221.

KING. By the 33 *H.* 8. *c.* 12. perſons maliciouſly ſtriking in the king's palace, wherein he reſides, by which blood is drawn

drawn, is punishable by perpetual imprisonment, fine at the king's pleasure, and loss of the offenders right hand. See GOVERNMENT.

KING'S BENCH. The court of king's bench at Westminster, is a court that hath supreme authority, the king himself being supposed to sit there. The judges in this court, are the sovereign justices and coroners of the land; and their jurisdiction is general over all England. This court is divided into the crown-side, and plea-side; the one determining criminal, and the other civil causes: the crown-side takes notice of all treasons, felonies, breaches of the peace, and of all causes prosecuted by way of indictment, or information; and into this office, indictments from all inferior courts, orders of sessions, &c. may be removed by *certiorari*. On the plea-side, it hath cognizance of all pleas by bill for debt, account, covenant, actions upon the case, and all personal actions, ejectment, &c. against any person in custody of the marshal, as every one sued here is *supposed* to be; and in all personal actions, for or against any officer, minister, or clerk of the court; who, in respect to their attendance, have the privilege of the court. 4 *Inst.* 73, 71. 4 *Rep.* 57. 9 *Rep.* 118. *Hawk. P. C.* 1. 2. *c.* 3. *Cromp. Jur.* 67, 68. 138.

This court grants writs of *habeas corpus* to relieve persons wrongfully imprisoned; restores freemen unjustly disfranchised; grants prohibitions to keep other courts within their proper jurisdictions; and repeals the king's letters patent, by *scire facias*. *F. N. B.* 20, 21.

L

LAND. If one man, who is assaulted and in danger of his life, runs through the ground of another without keeping in the footpath, an action does not lie against him; because the doing of this, which is necessary for the safety of his life is lawful. 37 *H.* 6. 37. *pl.* 26.

If J. S. goes into the ground of J. N. to succour a beast of J. N. the life of which is in danger, an action does not lie, because as the loss of J. N. if the beast had died would have been irremediable, the doing of this is lawful. *Bro. Tresp. pl.* 213

But if J. S. goes into the ground of J. N. to prevent the beaſt of J. N. from being ſtole, or to prevent his corn from being conſumed by hogs or ſpoiled, an action of treſpaſs *vi et armis* lies; for the loſs, if it had happened, would not in either of theſe caſes have been irremediable. *Ibid.*

If the wind blows down a tree the property of J. S. and it falls upon the land of J. N. it is lawful for J. S. to go upon the land of J. N. for the purpoſe of fetching it away. *Ibid.*

But if the loppings of a tree belonging to J. S. fall upon the land of J. N. it is not always lawful for J. S. to go upon the land of J. N. to take them away; for the falling of them there might perhaps have been prevented, if due caution had been uſed. *Ibid.*

But if ſuch loppings do, notwithſtanding all due caution to prevent it has been uſed, fall upon the land of J. N. and J. S. goes upon this land to fetch them away, this action does not lie; becauſe the falling of them there was unavoidable. *Ibid.*

If the fruit of a tree belonging to J. S. falls upon the land of J. N. it is lawful for J. S. to go upon the land of J N. to fetch it away, becauſe their falling there could not be prevented. *Latch.* 120.

If J. S. walk, without keeping in the footpath, in the ground of J. N. to look for a beaſt which he has loſt, an action of treſpaſs lies. 2 *Roll, Abr.* 565. But if the beaſt of J. S. which has been ſtole, is put into the ground of J. N. it is lawful for J. S. to go therein and take it. 2 *Roll. Rep.* 55.

If J. S. has driven the beaſt of J. N. into the ground of J. S. or if it has been driven into it with the aſſent of J. S. and J. N. fetches it out, an action does not lie, for J. S. was himſelf in this caſe the firſt wrong doer. 2 *Roll. Abr.* 566. *Cro. Eliz.* 329.

If J. S. chaſes the beaſt of J. N. which is doing damage in the ground of J. S. into the ground of J. N. an action does not lie, for J. S. had a right to this. *Latch.* 120. But if a ſtranger chaſes the beaſt of J. N. which is doing damage there, out of the ground of J. S. an action of treſpaſs lies; for by this means, altho' it ſeems to be for his benefit, J. S. is deprived of his right to diſtrain this beaſt. *Bro. Treſp. pl.* 421. *Keilw.* 46.

If A. chaſes the beaſt of B. which is damage-feaſant there, with a little dog out of the ground of A. and the dog, not-

withſtanding the endeavours of A. to call him off, afterwards chaſes it into the ground of C. an action does not lie; for the chaſing of this beaſt out of his own ground by A. was lawful, and it was not in his power to prevent its being chaſed into the ground of C. *Latch.* 119. *Miller and Fawdry.* 1 *Jon.* 131.

But if J. S. has commanded A. to deliver a beaſt to J. N. and J. N. goes into the cloſe of J. S. to receive this beaſt, an action of treſpaſs lies; for as the beaſt might have been delivered at the gate of the cloſe, the going in of J. N. was not of neceſſity. *Bro. Treſp. pl.* 342.

If J. S. has ſold trees growing upon his land to J. N. J. N. may enter upon the land whenever he pleaſes, to cut and carry them away; for the right of ſo doing is incident to the purchaſe. 2 *Roll. Abr.* 567. *M. pl.* 1.

And if the land, on which trees growing are ſold, is afterwards ſold, the vendee of the trees may, notwithſtanding the ſale of the land, enter thereon to cut and carry away. *Bro. Treſp. pl.* 400.

If a man, who was ſeiſed in fee of land, after having felled trees thereon dies, it is lawful for his executor, or the vendee of his executors, to enter in a reaſonable time and carry theſe away; for a reaſonable time is by law given to an executor, to poſſeſs himſelf of the goods of his teſtator. 2 *Roll. Abr.* 564. *H. pl.* 1. *pl.* 2. 1 *Brownl.* 224.

If J. S. has a right to a pipe which ſerves as a watercourſe through the land of J. N. it is lawful for J. S. to come upon this land and dig, to incloſe or mend it; for the right of doing both theſe is incident to the right of having ſuch pipe. 2 *Roll. Abr.* 567. *M. pl.* 2.

If a man goes with men, or horſes, upon land which lies contiguous to a navigable river, in order to tow a boat or barge, this action does not lie, becauſe the doing thereof is for the public good. *Ld Raym.* 725. *Young's caſe.*

If J. S. digs upon the land of J. N. in order to raiſe a bulwark againſt enemies, this action does not lie, becauſe this is done for the ſafety of the public. *Bro. Treſp. pl.* 213.

If J. S. goes into the ground of J. N. to beat or draw for a fox, in order to hunt it, this action lies. 2 *Bulſtr.* 62. *Cro. Jac.* 321.

But if J. S. purſues a fox, badger, or any other vermin into the ground of J. N. and hunts it there, this action does

not lie, becauſe the deſtruction of theſe is for the public good. 2 *Bulſtr.* 62. *Cro. Jac.* 321.

If however the fox, of which J. S. is in purſuit, runs to earth in the ground of J. N and J. S. digs it out, this action lies, for the fox might have been got out by other means. 2 *Bulſtr.* 62. *Cro. Jac.* 321.

The point is not perhaps quite ſettled; but it ſeems to be the better opinion that if J. S. purſues any creature, which is not of the vermin kind, into the ground of J. N. an action of treſpaſs *vi et armis* lies, although the ſame was found in the ground of J. S.

It is in one book laid down, that all hunting, except for the deſtruction of vermin, was at the common law unlawful. 2 *Bulſt.* 61.

By the 4 *and* 5 *W. and M. cap.* 23. *par.* 10. it is provided, that if an inferior tradeſman hunts in the ground of another, he ſhall, beſides being anſwerable for damages, be liable to full coſts.

It ſeems to follow, that every other perſon who hunts any creature, which is not of the vermin kind, in the ground of another, is liable to damages, although he is exempted by the 22 *and* 23 *Car.* repealed as to inferior tradeſmen, from paying more coſts than damages, unleſs damages are given to the amount of forty ſhillings.

It is alſo laid down, that although J. S. who has flew a hawk at a pheaſant in his own ground, is entitled to it if it is killed by this hawk in the ground of J. N. it is not lawful for J. S. to go into the ground of J. N. to take it away. *Bro. Treſp. pl.* 111. 2 *Bulſt.* 61.

It is indeed laid down in ſome books, that if J. S. who has ſtarted a hare in his own ground, purſues it into the ground of J. N. and kills it there, the hare belongs to J. S. becauſe the local property which was in him is continued by the purſuit: but as it is not ſaid, that it is lawful for J. S. to purſue this hare into the ground of J. N. the doctrine of theſe books does not contradict what is laid down in the others, and what may be fairly inferred from the ſtatutes juſt now cited. 11 *Mod.* 75. *Godb.* 123. *Salk.* 556.

It may likewiſe be fairly inferred from ſome of the books juſt now cited, in which it is laid down, that it is lawful for J. S. to purſue vermin into the ground of J. N. becauſe the deſtruction thereof is for the public good; that if J. S. purſues any creature, in whoſe deſtruction the public is not intereſted,

tereſted, into the ground of J. N. an action of treſpaſs *vi et armis* lies.

If J. S. is entitled to the corn growing upon land in the poſſeſſion of J. N. his entry to cut and carry the ſame away is lawful. 1 *Inſt.* 56.

But it is not lawful for J. S. in ſuch caſe to enter and cut the corn before it is ripe; for as on the one hand the good of the public in many caſes requires, that one man ſhould be intitled to the corn growing upon land which is in the poſſeſſion of another, becauſe the ſowing of land is thereby encouraged; ſo on the other hand it is for the public good, that no man ſhould cut corn before it is ripe. 1 *Vent.* 222.

It is lawful for the perſon to whom tithes which have been ſet out belong, to come upon the land, and do what is neceſſary in order to prepare the ſame for being carried away. *Bro. Treſp. pl.* 50. *pl.* 325. *Bro. Diſm. pl.* 12.

If J. S. is going to diſtrain a beaſt upon land holden of him, and the tenant, after J. S. has had a view of the beaſt upon this land, drives it, in order to prevent its being diſtrained, into the land of J. N. it is lawful for J. S. to follow and diſtrain it there. 1 *Inſt.* 161. 2 *Roll. Abr.* 566.

If J. S. makes coney burrows in his own ground, and ſome conies bred therein do damage in an adjoining ground of J. N. J. N. may kill them; but this action does not lie, becauſe as J. S. has no property in the conies, which are *wild by nature*, after they are gone out of his own ground, he is not anſwerable for any action done by them. 5 *Rep.* 104. *Cro. Car.* 554.

If J. S. has a right of common on a piece of land, and J. N. has a piece of land adjoining to this commonable piece which he is not bound to incloſe; and the beaſt of J. S. which was put upon the commonable piece, goes upon the land of J. N. an action of treſpaſs *vi et armis* lies; for it was the duty of J. S. to have prevented this. *Bro. Treſp. pl.* 345. But if J. S. who ought to keep up a fence between his own cloſe and that of J. N. ſuffers it to be out of repair; and the beaſt of J. N. goes through ſuch fence into the cloſe of J. S. an action does not lie, becauſe in this caſe the damage ariſes from the default of J. S. 1 *Roll. Abr.* 565.

If J. S. is driving a beaſt along a highway, which lies through an open field belonging to J. N. and this beaſt goes out of the highway and feeds in ſuch field, an action of treſpaſs lies; for it was the duty of J. S. to have prevented this.

But if a beaſt, which is ſo driving, does againſt the will of the driver bite a little of the corn, or graſs, that grows by the ſide of the highway, an action does not lie, for the damage could not well be prevented in this caſe. *Ibid.* 566. See PLAINTIFF and DEFENDANT.

An action of treſpaſs lies for breaking a cloſe, mowing of graſs, or eating of corn by cattle.

LARCINY. Is a theft, or the felonious taking and carrying away of the perſonal goods of another. And larcinies are either *ſimple* or *mixed*. Simple larciny, when it is the ſtealing of goods not *above* the value of 12 d. is called *grand* larciny, and is puniſhable with death with benefit of clergy; and when of goods either under or only of that value it is called *petit* larceny, and is puniſhable with whipping, &c. By the ſtatute 18 *Car.* 2. *c.* 3. benefit of clergy is taken away from horſe-ſtealers and their acceſſaries.

Simple larciny is the bare ſtealing of any perſonal thing unaccompanied with any other atrocious circumſtances.

To make this crime, there muſt be a *felonious taking*: therefore no delivery of goods from the owner to the offender upon truſt can ground a larciny. So that if a man has the poſſeſſion of goods lawfully, and he afterwards carry them away with an ill intention, it is no larciny: as if I ſend goods by a carrier, and he carries them away, this is no larciny. 1 *Hal. P. C.* 504. But if the carrier opens a pack of goods, or pierces a veſſel of wine and takes away part, or if he carries it to the place appointed, and afterwards takes away the whole, theſe are larcinies. 3 *Inſt.* 107.

If a taylor embezzles cloth delivered to him to make a ſuit of cloaths, &c. it is not a felonious taking; nor is it felony where a ſervant goes away with his maſter's goods delivered to him; but only a breach of truſt, by reaſon of the delivery. But by the ſtat. 21 *H.* 8. *c.* 7. they are to be under the value of 40 s. for if they are above that value it is felony, except in ſervants under eighteen years old, and apprentices. And if the ſervant has not the poſſeſſion but only the care and overſight of the goods, as a bureau of plate, and a ſhepherd of ſheep, or the like, the embezzling them is felony at the common law. 1 *Hal. P. C.* 500. So if a gueſt robs his inn or tavern of a piece of plate, it is larciny; for he hath not the poſſeſſion but merely the uſe. *Ibid.* 90. And ſo it is declared to be by the 3 *and* 4 *W. and M.* if a lodger runs away with the goods from his ready furniſhed lodgings.

If

If I lend a man a horſe to go to a certain place, and he rides away with him, it is not larciny; but the proper remedy is by action at common law for the damage. But if one comes on pretence to buy a horſe, and the owner gives him leave to ride him, if he rides away with the horſe, it is felony; for here an original felonious intention is implied. 3 *Inſt.* 105. *Wood* 364, 365.

Where a perſon finds the goods of another which are loſt, and converts them to his own uſe, though with an intention of theft, yet as the firſt taking was lawful, it is no larciny. Tho' if one intending to ſteal goods, gets poſſeſſion of them by proceſs at law unduly obtained, the taking by legal proceſs, in abuſe of the law, is a felonious taking. 3 *Inſt.* 108. *Hal. P. C.* 61. 3 *Inſt.* 64.

If two perſons ſteal goods to the value of 13 d. it is grand larciny in both; and if one at different times ſteals divers parcels of goods from the ſame perſon, which together exceed the value of 12 d. they may be put in one indictment, and the offender found guilty of grand larciny; but this is rarely done; on the contrary, the jury ſometimes find ſpecially the goods of leſs value than 12 d. ſo as to render it but petit larciny, tho' the offender be indicted for ſtealing things to 30s. or 40s. value. *Hal. P. C.* 70. *Dalt.* 366. *Hetl. Rep.* 66.

There muſt alſo be a *carrying away*, and a bare removal of the goods from the place where the goods were placed, tho' not carried off the premiſes is ſufficient. 3 *Inſt.* 108, 109.

Mixed or *compound* larciny has all the properties of the former, but is accompanied either with taking from a man's perſon or houſe, or both: larciny from the houſe is not diſtinguiſhed from ſimple larciny by the common law, unleſs where it is accompanied with breaking the houſe by night, and then it is *burglary*. But by ſeveral ſtatutes the benefit of the clergy is taken away in almoſt every inſtance of larcinies committed in an houſe. Larciny from the perſon is either by privately ſtealing or by open and violent robbery. Privately ſtealing from a man's perſon by picking his pocket, &c. is debarred the benefit of clergy, where it is above the value of 12 d. by the 8 *Eliz. c.* 4. In order to conſtitute a robbery there muſt be a taking, for a mere attempt to rob is by the 7 *Geo.* 2. *c.* 21. made felony tranſportable for ſeven years. And it is immaterial what the value of the thing

taken is, but it muſt be by force, or putting in fear: for this conſtitutes the difference between robberies and other larcinies, and this ſpecies of larciny is by the 23 *H.* 8. *c.* 1: and the 3 *and* 4 *W. and M. c.* 9. debarred of the benefit of clergy.

LAW SUITS. See BARRATRY and MAINTENANCE.

LEASE. Leaſes and grants made by eccleſiaſtical perſons, &c. not warranted by the ſtatutes, are not void as to the leſſors and grantors themſelves, but are either void or voidable as to the ſucceſſors, &c. the ſtatutes being made for the benefit of the ſucceſſors againſt the predeceſſors acts.

It is held that a biſhop or other ſuch perſon accepting rent upon a leaſe made by his predeceſſor of things in livery, makes it good: and if a perſon makes a leaſe of things in livery, for *life* or *lives*, and die or is removed, acceptance of rent by the ſucceſſor will make it good, becauſe it is not by ſuch death, &c. void, but voidable only.

But if a parſon, vicar, &c. make a leaſe *for years*, of any of the poſſeſſions of the church, there no acceptance or other act of the ſucceſſor can make the leaſe good, becauſe the leaſe is abſolutely void by their death, without entry or other ceremony. *Dyer* 46. See Penant's caſe. 3 *Rep. Dyer* 239. *Hodgkis verſus Tucker.* 7 *Rep. Earl of Bedford's caſe.*

But as to things which lie in grant, there ſeems to be a diverſity between the common law, and the law as it ſtands at this day upon the ſtatutes; for if a biſhop, or other eccleſiaſtical perſon (except parſons, vicars, &c.) make a leaſe *for lives* of a portion of tithes, or others incorporeal hereditament, reſerving the ancient rent, and dies, &c. and the ſucceſſor accepts the rent, yet this acceptance ſhall not bind him, becauſe the leaſe was abſolutely void by the predeceſſors death, without entry or other ceremony; and the reaſon of its being thus abſolutely void is, becauſe the things leaſed lying only in grant or prender, no rent could be received which the ſucceſſor could recover; for he could not diſtrain becauſe there was nothing of which a diſtreſs could be taken; and an action of debt would not lie, becauſe the leaſe being for lives, no action of debt was maintainable 'till after the lives ended; and therefore ſince his acceptance of the rent due at one day will not enable him to ſue for it, if afterwards denied, he ſhall not be bound by ſuch acceptance; but if the thing lying in grant, had been

let

let *for years*, there the ſucceſſor's acceptance of the rent could have bound him during his time, becauſe then he might have an action of debt for any arrears that ſhould afterwards incur; and this conſtruction ſeems to ariſe wholly from the ſtatutes before hinted at, which as above obſerved was made wholly for the benefit of ſucceſſors. *Cro. Jac.* 173. *Comp. Incumb.* 308, 381. *Palm.* 175. *Degg.* 134, 318. *Bro. Tit. Leaſe* 41.

As to parſons, vicars, &c. leaſes *for years* made by them, whether of things in livery or things in grant, determine abſolutely by their death, if not duly confirmed, or the ſtatutes not purſued, becauſe then they remain at common law. 3 *New. Abr.* 394.

Acceptance of rent which can affirm a voidable leaſe muſt be by him who is perfect ſucceſſor. *Palm.* 517. For where this is done by a biſhop's bailiff, *of his own head*, and without any order from the biſhop, the biſhop ſhall not be bound: but where a biſhop having made a voidable leaſe of certain lands, parcel of ſuch a manor, dies, and the bailiff of the manor informs the ſucceſſor, that there are certain rent in arrear of that manor, and thereupon the biſhop commanded him to receive the ſaid rents, which he does, and among the reſt the rent upon the voidable leaſe, and after paid all the ſaid rents to the biſhop, without giving him particular notice of that rent, this acceptance ſhall bind the biſhop, for it is at his peril to take notice. 1 *Roll. Abr.* 474. *Hetley* 24. *Cro. Car.* 95.

Where the leſſor diſtrains for rent in arrear, and the leſſee tenders part of it, the leſſor is not bound to accept ſuch part; but if he diſtrains for arrears due at ſeveral days, on which the rent ought to be paid, and the leſſee tenders the arrears due on ſuch a day, the leſſor is bound to accept it. 3 *Salk.* 2.

An acceptance of rent after the day of payment does not bar a right of entry veſted by non-payment, becauſe the rent being a duty, and owing, the party might well accept it; but it is otherwiſe after a diſtreſs is taken, or the rent is accepted at another day ſubſequent, for either of them affirms the continuance of the leaſe. 3 *Salk.* 3, 4.

A leaſe for years was made on condition to be void if the leſſee aſſigns over the term; the leſſee afterwards made an aſſignment, and the leſſor knowing of ſuch aſſignment, accepted the rent; it was adjudged that this will not make the

leaſe

leaſe good, becauſe it was abſolutely void before the acceptance. 3 *Salk.* 4.

Voidable leaſes may be alſo made good not only by acceptance of rent, but alſo by diſtraining for rent due at the death of the predeceſſor, or by bringing an action of waſte againſt the leſſee; or, in caſe the leaſe be for life or lives, by bringing an aſſize for rent due after the death of the predeceſſor, or acceptance of fealty from the leſſee. *Dyer* 239. *Fitz. Tit. Abbot* 9. *Bro. Tit. Acceptance* 15.

Voidable leaſes are in general avoided, by *entry* if of things corporeal, or by *claim* where they are incorporeal. *Dyer* 222. 1 *Sid.* 7.

Leaſes for *years*, abſolutely made by tenants for life, as tenant in dower, or by the curteſy, reſerving rents are abſolutely determined by their deaths, ſo that no acceptance by the heir, or reverſioner can make them good. *Bro. Tit. Acceptance* 14, 19. *Tit. Leaſes* 17, 19. *Plow*, 30, 272. *Cro. Car.* 398, 399, 1 *Jon.* 354. *Vaugh.* 80, 81. But if the reverſioner confirms the leaſe during the life of the tenant for life, this will make it unavoidable for the whole term, for in this he waves every advantage. Yet where the leaſe is for years, *if the leſſor ſhould ſo long live*, tho' it be confirmed by the reverſioner, it ſhall be abſolutely void upon the leſſor's death; for there the death of the tenant is fixed as the expreſs determination of it, beyond which no confirmation can enlarge it. *Poph.* 105. 1 *Co.* 147.

Leaſes for years made by infants are voidable when at full age. 1 *Roll. Abr.* 729, 730. 3 *Mod.* 307. *&c. &c.* but it ſeems a doubt whether leaſes made without reſervation of rent are not abſolutely void. *Moor* 105. 2 *Leon.* 218. *Hutton* 102. 1 *Roll. Rep.* 441. *and Moor* 78. 1 *Lev.* 6. *Co. Lit.* 45. *b.* 308. *a.*

If an infant takes a leaſe for years of lands, rendering rent, which is in arrear for ſeveral years, and the infant being come of age continues his occupation, this makes the leaſe good and unavoidable, and ratifies the contract *ab initio*, and conſequently makes him chargeable with all the arrears incurred during his minority: tho' he might otherwiſe have departed from his bargain, and avoided payment of the arrears. *Cro. Jac.* 320. *Godb.* 120. 2 *Bulſt.* 69. 1 *Roll. Abr.* 731.

An infant making a leaſe, may by acceptance of rent, *&c.* when of age confirm it.

Leaſe

Leaſes by writing indented made by huſbands of lands held in the wife's right, if made agreeable to the 32 *H.* 8. cannot be avoided by the wife; but if not made agreeable to the directions there laid down, tho' made by indenture, ſhe may avoid the leaſe tho' ſhe herſelf was a party; but if ſhe accepts the rent after her huſband's death ſhe confirms the leaſe. 1 *Roll. Abr.* 350. *Cro. Car.* 165, 406. *Cro. Jac.* 563, 617. *Cro. Eliz.* 769. *Yelv.* 1. And if huſband and wife join in a leaſe for years by *parol* of the wife's lands, rendering rent, this being unaided by the ſtatute, determines abſolutely by his death, ſo that no acceptance of rent, or other act done by the wife will prevent its voidance. *Cro. Eliz.* 656. *Cro. Jac.* 563. *Dyer* 91, 146. 1 *Leon.* 192, 204.

If a tenant in tail makes a leaſe for years not warranted by the ſtatute, rendering rent and dies; if the iſſue accepts the rent, it ſhall bind him. 3 *Leon. Caſe* 36.

If a tenant in tail makes a leaſe for years, and dies without iſſue, the leaſe is abſolutely determined by his death, ſo that no acceptance of rent by thoſe in reverſion or remainder can make it good. 8 *Co.* 34. *Moor* 133. *Co. Lit.* 44. *a. Cro. Eliz.* 602. *Bro. Tit. acceptance.* 19.

If a leaſe is made on condition that the leſſee ſhall not do waſte, if he doth waſte, and afterwards the leſſee accepts the rent, he cannot enter. *Godb.* 47.

On an action of debt for rent, the defendant pleaded in bar, that before the action brought he aſſigned the leaſe to R. B. and that the leſſor had accepted the rent of R. B. the aſſignee, which became due after the aſſignment; and it was adjudged that ſuch acceptance was ſufficient notice of the aſſignment, and that the plaintiff could not reſort to the firſt leſſee. 2 *Bulſt.* 151. 3 *Rep.* 24.

If a leſſor accepts from his tenant the laſt rent due to him, and gives the leſſee a releaſe for it, all rent in arrear is by law preſumed to be ſatisfied. *Co. Lit.* 373.

LENDING. See BAILMENT.

LETTER OF ATTORNEY. See AUTHORITY.

LEWDNESS. Perſons guilty of a ſcandalous and public indecency, may be indicted, and are liable to a fine and impriſonment. 1 *Siderf.* 168.

LIBELS. A libel ſignifies a ſcandalous report of any man, ſpread abroad, or otherwiſe unlawfully publiſhed: it is a malicious

malicious aſpertion of one that is alive, or the memory of the dead; and may be expreſſed in writing, or by ſigns, pictures, &c. as by painting a gallows upon a man's door, or exhibiting the repreſentation of a perſon with a fool's coat, or aſſes ears. 5 *Rep.* 125.

If a libel be made againſt a private man, it may excite the libelled, or his friends, to revenge; and if againſt a magiſtrate, it is not only a breach of the peace, but a ſcandal to the government; and although a private man, or magiſtrate, be dead at the time of the libel, yet it is puniſhable, as it tends to the breach of the peace. Printing or writing may be libellous, though the ſcandal is not charged in direct terms, but ironically; or though there be only the firſt and laſt letter of the name, if the jury will find it to point to a particular perſon. Sending an abuſive letter to one, without publiſhing it, is no libel; but if it be any ways diſperſed, it is a publication of the libel. The contrivers, procurers and publiſhers of a libel, knowing it to be ſuch, are puniſhable. If one dictates, another writes, and the third approves, they are all guilty of making the libel. 5 *Rep.* 125. *Hob.* 215. *Trin.* 12 *Ann.* 12 *Rep.* 34. 1 *Lev.* 139. 9 *Rep.* 59. *Moor Ca.* 1100. 5 *Mod.* 167.

Every one convicted of publiſhing a libel, ought to be eſteemed the contriver or procurer. And if bookſellers publiſh or ſell libels, though they know not the contents, it is ſaid they are puniſhable. If one reads a libel, it is no publication; but if he repeats it, or any part of it in the hearing of others, it is a publication of the libel; though if part of it be repeated in mirth, without any malicious purpoſe of defamation, it is no offence. If one writes a copy of a libel, and does not deliver it to others, the writing is no publication; but if publiſhed, it may be evidence that *he* publiſhed it, unleſs after the writing he deliver it to a Magiſtrate. If a libel is found in a houſe, the maſter cannot be puniſhed for framing, printing and publiſhing it, but he may be indicted for having it, and not delivering it to a magiſtrate. *Moor* 627. 9 *Rep.* 59. *Moor* 862. 1 *Vent.* 31. 5 *Rep.* 125.

When a man finds a libel, if it be againſt a private perſon, he ought to burn it, or deliver it to a magiſtrate; but if it concerns a magiſtrate, he ſhould deliver it immediately to ſome magiſtrate. A libeller is puniſhable though the matter

ter of the libel is true; for it is not material whether it be true or falſe, if the proſecution be by information or indictment, ſince the provocation is the chief object of the law: but in an action on the caſe a man may plead in his juſtification that it is true. 5 *Rep.* 125. *Hob.* 253. *Hard* 470.

A libeller, publiſher of a libel, and procurer of the publiſhing it, may be puniſhed on indictment, by fine and impriſonment, pillory, or other corporeal puniſhments, according to the degree of the offence. 5 *Rep.* 125. 5 *Inſt.* 174. 3 *Cro.* 175.

Scandalous matter in legal proceedings in a courſe of juſtice, &c. amounts not to a libel.

LIBERTY. See FALSE IMPRISONMENT.

LIGHT. If a man hath an ancient houſe, and another builds a houſe on a new foundation, ſo near that his windows are darkened, he may have an action on the caſe againſt him; but he cannot if he build it where another houſe formerly ſtood. 9 *Co.* 58. 1 *Danv.* 203. *Carth.* 454. 6 *Mod.* 116, 313. 1 *Bulſt.* 116. See NUISANCE.

LIGHTERMAN. See CARRIER.

LIP. See MAYHEM.

LODGINGS. See LARCINY.

LOSS. See BANK NOTE, BILL of EXCHANGE, FINDING and LARCINY.

LUNATICKS. A lunatick is a perſon who is ſometimes of a good and ſound memory, and ſometimes not.

Every deed made by a lunatick is voidable. As a lunatick underſtandeth not what he does, he cannot lawfully promiſe, or contract for any thing: and in criminal caſes his acts ſhall not be imputed to him, unleſs he kill, or offer to kill the King, in which caſe he ſhall be guilty of treaſon. *Lit.* 405, 406. 4 *Rep.* 126. 1 *Inſt.* 247.

A lunatick muſt ſue in his own name; but if an action be brought againſt a lunatick, under age, he ſhall appear by guardian, and by an attorney, if of full age. The King hath the guardianſhip of the lands of lunaticks; but not the cuſtody of their lands, or bodies, as he hath of idiots. And the King, or other guardian of a lunatick, is accountable to him, his heirs, executors, &c. 1 *Inſt.* 135. 4 *Rep.* 124.

By the ſtatute, 17 *E.* 2. *c.* 10. the King is to provide that the lands of lunaticks be ſafely kept without waſte, and they

they and their families maintained by the profits; and the reſidue ſhall be kept for their uſe, and be delivered to them when they come to their right mind. 17 *E.* 2. *c.* 10.

Commiſſions of lunacy iſſue out of Chancery, to examine whether perſons are lunatick or not, as do inqueſts of their lands, &c.

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MAGISTRATES. Judges, juſtices, or other magiſtrates, guilty of oppreſſion and tyrannical partiality are puniſhable (either by impeachment in Parliament, or by information in the Court of King's Bench, according to their rank) with forfeiture of their offices, fines, impriſonment, &c. according to the aggravations of their offence. 4 *Bl. Com.* 141. See MINISTERS of JUSTICE.

MAIM. See MAYHEM.

MAINTENANCE. Maintenance is an offence that bears a near relation to common barretry, and is an officious intermeddling in a ſuit that no way belongs to one, by maintaining or aſſiſting either party with money, or otherwiſe, to proſecute or defend it. 1 *Hawk. P. C.* 249. And it is puniſhed at the Common Law, by indictment, &c. with fine and impriſonment. *Ibid.* 255. And by the 32 *H.* 8. *c.* 9. with the forfeiture of 10l.

MALE. See DESCENT.

MALICIOUS PROSECUTIONS. Where one falſely, maliciouſly, and without probable cauſe of ſuſpicion proſecutes another for any crime whatever by which the party may be endangered in his life, liberty, reputation or property, an action on the caſe in the nature of a conſpiracy will lie; whether the party proceeded actually to exhibit an indictment upon which he was acquitted or not: yet it will not lie for bringing a civil action, for there the defendant has his coſts, and the plaintiff ſhall be amerced for his falſe claim. Yet *vide poſt.*

If in an iſſue between two, a ſtranger gives falſe evidence againſt one, by which the verdict goes againſt him, yet no conſpiracy lies againſt him, for what he gave in evidence is not of record. 1 *Roll. Abr.* 110. 1 *Danv.* 195.

An

An action on the caſe lies againſt a juſtice of the peace who iſſues his warrant for the apprehenſion of one, under a pretence of his being accuſed of ſtealing a horſe, and detains him 'till he enters into a bond for his appearance; if he was not ſo accuſed, nor ſtole ſuch horſe, for tho' he is excuſed if he iſſues his warrant upon a falſe accuſation, yet he is not, if there be no accuſation at all. 1 *Leon.* 187. *Cro. Eliz.* 130.

But if he procures witneſſes to give evidence upon an indictment, this is but his duty; and tho' his name is indorſed on the indictment to give evidence, yet this does not make him a proſecutor, and ſo no action lies againſt him for a malicious proſecution. 1 *Vent.* 57. 2 *Keb.* 572.

A. churchwarden of B. at the end of the year gave up his accounts to his ſucceſſor, and yet C. falſely and maliciouſly cited A. into the eccleſiaſtical court, to render an account, and at C's. requeſt was excommunicated, here an action lies againſt C. tho' the ſentence was given by the judge. *Raym.* 418. 2 *Jones* 132. *Hard.* 194, 195.

Altho' this action will not lie for the proſecution of civil actions, yet it has been held that if the plaintiff declares, that being arreſted at the defendant's ſuit, he intending to detain him in priſon falſely and maliciouſly, told the ſheriff that he owed him 500 l. requiring him to take bail accordingly, by which he was detained in gaol ſeveral days, that an action will lie becauſe of the ſpecial damage ſuſtained. 1 *Sid.* 424. 2 *Keb.* 546. 1 *Mod.* 4. 1 *Lev.* 275. Yet he muſt ſhew the grievance ſpecially. 1 *Salk.* 14. *Style* 379. 1 *Saund.* 228. 1 *Vent.* 12, 19, 86. 1 *Danv.* 196.

In caſe for maliciouſly holding to bail, the declaration ſhould ſet forth the ſum due and the proceſs ſpecially, and that the firſt action is determined and how. 1 *Salk.* 15. 2 *Salk.* 456, 767. 5 *Mod.* 223, 224. 6 *Mod.* 262. 10 *Mod.* 145, 152, 153, 200, 216, &c. 12 *Mod.* 648, 654. *Yelv.* 117. *Str.* 114. 1 *Sand.* 228. 2 *Lev.* 275. *Hob.* 267.

An action on the caſe will not lie for commencing two ſuits for the ſame cauſe of action. 1 *Roll. Abr.* 101, 102.

If a man bring an action againſt me in the name of J. S. without the conſent of J. S. an action of the caſe lies againſt him for this vexation. 1 *Roll. Abr.* 101.

Upon an iſſue between A. and B. if one that was not returned of the jury, cauſes himſelf to be ſworn in the name of one that was returnod of the jury, and a verdict is given for

B.

B. A. may have an action on the caſe againſt the ſtranger, *March.* 81. *Palm.* 313.

If A. exhibits a petition to a committee of parliament, appointed for the examination of public grievances, and therein charges B. a doctor of laws, and vicar general to the biſhop of L. with ſeveral great offences in his office, as extortion, &c. and for the better manifeſtation of thoſe grievances, cauſes the petition to be printed, and to be delivered to ſeveral of the members of the ſaid committee; yet no action upon the caſe lies, for this printing and delivering of the caſe, is according to the order and courſe of proceedings in parliament. 1 *Sand.* 131. 1 *Mod.* 58. 11 *Mod.* 99. 12 *Mod.* 218. *Ld. Raym.* 341, 417, 486. 1 *Lev.* 240. *Vide Godb.* 405.

In *caſe* the plaintiff declared, that the defendant maliciouſly levied a plaint in London, and proſecuted the plaintiff thereon, *ubi revera*, the cauſe of action aroſe at D. in Kent, out of the juriſdiction of the court of London; after verdict for the plaintiff, the court inclined that the action would not lie, for the plaintiff might have pleaded to the juriſdiction; and if they had refuſed his plea he might have applied for a prohibition. *Carth.* 189. *Vide* 1 *Vent.* 369. 2 *Jones* 214. *Hob.* 205. *Cro. Jac.* 667. 1 *Sid.* 463. 1 *Sand.* 221. 4 *Co.* 14.

An action on the caſe will not lie for ſuing an attorney in an inferior court, for he may plead his privilege if he pleaſe, 1 *Mod.* 209, 210. 10 *Mod.* 41, 45, 263. 12 *Mod.* 4. *Barnes* 32, 35, 36, 302. 2 *Barnes* 4, 34, 36, 290. 2 *Wms.* 104.

If an attorney in an action of debt, knows of and was witneſs to a releaſe of the debt made antecedent to the commencement of the action for it, yet as the attorney acts only as a ſervant in the way of his profeſſion, an action does not lie againſt him. 1 *Mod.* 209.

If A. declares that he had obtained judgment againſt J. S. for 100l. and that 100l. more was due to him for rent arrear, that he intending to take out execution, and alſo to bring an action of debt for the rent in arrear (tho' J. S. being then poſſeſſed of goods and chattels ſufficient to diſcharge the whole) which being very well known to B. (the defendant) he by covin conſpiring with the ſaid J. S. to defeat him of his execution, and of recovering the money for rent arrear, procured the ſaid J. N. to confeſs a judgment for 160l. (of ſuch a term) to one J. N. whereas in truth J. S. owe

S. owed the ſaid J. N. nothing, and that he ſued out execution on this feigned judgment, by virtue whereof he ſeized all the goods and chattels of the ſaid J. S. which he eſloigned to places unknown, and converted to his own uſe, by reaſon whereof the plaintiff loſt his debt, the action well lies. *Carth.* 3, 4. adjudged in demurer in B. R. and affirmed in the houſe of peers. See CARRIERS.

MANSLAUGHTER. Manſlaughter is the unlawful killing of a man, without any prepenſed malice; as when two meet, and upon ſome ſudden falling out the one kills the other. It differs from murder, in that it is not done with foregoing malice, and from chance-medley, having a preſent intent to kill. This crime is felony; but for the firſt time admits of clergy, and the offender ſhall be burnt in the hand, and forfeit all his goods and chattels.

It muſt be upon a ſudden quarrel, where the offender doth not appear to be maſter of his temper; as where two perſons meet together, and in ſtriving for the wall one of them kills the other, this is manſlaughter: and ſo it is if they had upon a ſudden occaſion gone into the fields and fought, it being a continued act of paſſion. If two fall out on a ſudden and fight, and one breaks his ſword, and a ſtranger ſtanding by lends him another, with which he kills his adverſary, it is manſlaughter in them both. If a man's friend is aſſaulted, and he in his defence on a ſudden takes up a miſchievous inſtrument and kills the enemy of his friend, this is manſlaughter. So it is where a man in reſcuing another injuriouſly reſtrained of his liberty, by pretended preſs-gangs, &c. kills any of them. And when a man is taken in adultery with another perſon's wife, if the huſband *ſuddenly* kills the adulterer it is only manſlaughter; but if there be any thing in his conduct which indicates prepenſed malice, it is murder. *Cromp.* 25. 1 *Lev.* 180. 2 *Cro.* 296. 3 *Inſt.* 51, 55. *H. P. C.* 56. *Plowd.* 101. 12 *Rep.* 87. *Kel.* 46, 60, 136. 1 *Vent.* 158. *Raym.* 212.

The killing is to be on an immediate falling out, or on a juſt provocation; but no breach of a man's word, or treſpaſs, nor affront by words or geſtures, will be thought a juſt provocation to excuſe the killing of another: though if upon ill words, as giving the lie, calling another ſon of a whore, or the like, both parties ſuddenly fight, and one kill the other, this is but manſlaughter, being upon a ſudden heat. And if one upon angry words aſſaults another, by pulling

him by the noſe, and he that is aſſaulted immediately kills the other, this is only manſlaughter, the peace being firſt broke by the perſon killed. If two fencing maſters play at hand-ſword, and one wounds the other of which he dies, it is but manſlaughter. And when two play at foils, and one kills the other, it is manſlaughter only, for in theſe caſes the miſchief is without malice. *Kel.* 130, 131, *&c. Kel.* 55, 60. *Kel.* 135. 3 *Inſt.* 56, 160. *H. P. C.* 32, 57.

If one throws a ſtone over a wall, in a place where people often reſort, or at another in play, and kill a perſon; if done without an evil intention, it is manſlaughter; but if with an intention to hurt, it is murder. And if a man ſhoot off a gun in a city, or public highway, which muſt endanger the life of ſome perſon, and one is killed, it is manſlaughter. But if a man ſhoots at the tame fowl of another, which is an unlawful act, and kills a ſtander by, it is murder: if he be ſhooting at wild fowl, hare, &c. and not qualified to keep a gun, or to kill game, and kill a perſon, it is manſlaughter; and where he is qualified to keep a gun, only chance medley. 3 *Inſt.* 57. 3 *Inſt.* 56.

When it appears that one hath killed another, it ſhall be intended that he did it maliciouſly, unleſs he can prove that he did it upon juſt provocation, &c. And there is a manſlaughter puniſhable as murder; for by the 1 *Jac.* 1. if any one thruſts or ſtabs another, not having a weapon drawn, or who hath not then firſt ſtricken the party ſtabbing, ſo that he dies within ſix months, although it were not of malice forethought, it is excluded benefit of clergy. But this doth not extend to perſons ſtabbing others *ſe defendendo*, or by misfortune, with no intent to commit manſlaughter. *Kel.* 27. 1 *Jac.* 1. *c.* 8.

And a weapon drawn at any time during the quarrel is within the ſtatute. Alſo drawing out a piſtol, and levelling it at the party, or throwing a pot, bottle, &c. at him, are within the equity of the words, *having weapon drawn.*—The ſtatute relates to the party only that actually gave the ſtroke, or ſtabbed the other, and not to thoſe that were aiding, or abetting. The perſon ſtabbing muſt be ſpecially indicted on the ſtatute, to be ouſted of clergy: and notwithſtanding he be ſo indicted the jury generally find the delinquent guilty of manſlaughter. 3 *Lev.* 255, 266. *H. P. C.* 58, 66.

Manſlaughter being an offence committed on a ſudden occaſion

occaſion there can be no acceſſaries before the fact. See MURDER.

MANSTEALING. See KIDNAPPING.

MARK. An action on the caſe lies for uſing the ſame mark which the plaintiff hath uſed to ſet to his cloaths, &c. &c. *Poph.* 144. *Cro. Jac.* 471. 2 *Roll. Rep.* 28.

MARRIAGE. All perſons of the age of conſent to marry, viz. the man at 14, and the woman at 12, (not prohibited by the Levitical degrees, or otherwiſe by God's law) may lawfully marry. The ſon of a father by another wife, and daughter of a mother by another huſband, couſin-germans, &c. may marry with each other. A man may not marry his ſiſter or brother's wife, an uncle his niece, an aunt her nephew, &c.; but if a man takes his ſiſter to wife, they are baron and feme, and the iſſue are not baſtards 'till a divorce. 1 *Inſt.* 24. 2 *Inſt.* 684. 32 *H.* 8. 38.

In contracting matrimony the conſent of the mind is chiefly regarded: and where a father or mother promiſes marriage for their child, the ſilence of the child hearing the ſame hath been adjudged a conſent. If a ring be ſolemnly delivered by a man, and put on a woman's fourth finger, if ſhe accepts, and wears it, the parties are preſumed to have mutually conſented to marriage. And if a man ſays to a woman, I promiſe to marry thee, and if thou art content to marry me, kiſs me, or give me thy hand; if a woman accordingly kiſs, or give her hand, eſpouſals are contracted. *Swinb. Matrim. Cont.* 69, 210. 1 *Inſt.* 357.

Upon marriages, ſettlements are uſually had of the lands of the huſband, &c. to the huſband for life, afterwards to the wife for her life, and to their iſſue in remainder, &c. with leaſes to truſtees for terms of years to raiſe daughters portions: and they are made ſeveral ways, by leaſe and releaſe, fine and recovery, covenants to ſtand ſeiſed to uſes, &c. Theſe ſettlements the law is ever careful to preſerve, eſpecially that part of them which relates to the wife, of which ſhe may not be diveſted but by her own fine. If a woman about to marry, to prevent her huſband's diſpoſal of her land, conveys it to a friend in truſt, and they with the huſband after marriage make a ſale of it, the Court of Chancery will decree the purchaſer to reconvey to her. *Accomp. Conv.* 143. *Toth.* 45.

A man before marriage gives a bond and judgment to the wife to leave her worth 1000l. at his death (in conſide-

ration of a marriage portion); this ſhall be made good out of the huſband's eſtate, and be ſatisfied before any debts, except a judgment, &c. be obtained againſt him with her conſent. *Accom. Conv.*

Where a huſband or wife departs and lives ſeparate without ſufficient reaſon, if either party deſire it, the Eccleſiaſtical Court will compel them to come together again.

By ſtatute, to ſteal any woman having an eſtate in lands or goods, or who is heir apparent, and marry or defile her, is felony: and it is the ſame if the taking be againſt her will. And taking away any woman child out of the cuſtody, and againſt the will of the father, guardian, &c. the offender ſhall be fined and impriſoned.—If any perſon married do marry any other perſon, the other huſband or wife being alive, it is felony; but where a huſband or wife are abſent beyond ſea for 7 years, and the one not knowing the other to be living, they are excepted out of the ſtatute. 3 *H.* 7. 2. 1 *P. & M.* 1 *Jac.* 1.

Parſons, vicars, &c. marrying any perſons without publiſhing the banns of matrimony, or without licence, ſhall forfeit 100l. and the perſons married 10l. and the pariſh clerk 5l. 7 & 8 *W.* 3. *Vide* 10 *Ann.*

The loyalty or lawfulneſs of marriage is always to be tried by the biſhop's certificate.

Where one has promiſed by writing to marry another, and afterwards refuſes to complete it, an action will lie againſt the offender, and in ſuch caſes heavy damages are often given.

If a man and a woman, being unmarried, mutually promiſe to marry each other, and afterwards the man marries another woman, by which he renders himſelf incapable of performing his contract, an action of *aſſumpſit* lies, in which the woman ſhall recover damages; for though matrimonial cauſes are regularly cognizable in the Spiritual Courts, yet the contract in the preſent caſe being *executory*, and revoked by the man by the ſubſequent marriage, could not be inforced by eccleſiaſtical cenſures, as a contract *in præſenti* may; hence therefore, there being no adequate remedy in the ſpiritual courts, and the loſs of marriage being a temporal injury, without there were a remedy in the temporal courts, there muſt be a failure of juſtice. *Carter* 233. 1 *Roll. Abr.* 22. 1 *Leon.* 147. *Stile* 295. 1 *Keb.* 866. 1 *Sid.* 180. 6 *Mod.* 172.

Such

Such action will alſo lie for a man againſt a woman: and ſuch promiſes are good, though the time of marriage be not agreed on; but in ſuch caſe it is neceſſary to intitle the party to his action, to alledge that he offered to marry her, and that ſhe refuſed. *Carth.* 467. 1 *Salk.* 24. 5 *Mod.* 511.

An action for breach of a marriage contract muſt be founded on reciprocal promiſes; and therefore, if the promiſe be on one ſide only it does not bind, being only *nudum pactum.* 1 *Salk.* 24.

But if a man of full age and a female of fifteen promiſe to intermarry, and afterwards he marries another, an action of aſſumpſit lies againſt him; for though ſuch promiſe may be ſaid to be voidable as to the infant, yet it ſhall be good againſt the perſon of full age, who ſhall be preſumed to have acted with ſufficient caution: otherwiſe this privilege allowed infants of reſcinding and breaking through their contracts, which are intended as an advancement to them, might turn greatly to their prejudice. *Trin.* 3 *Geo.* 2. 2 *Stra.* 850, 937.

A contract by words in the preſent tenſe, as, *I marry you, you and I are man and wife,* &c. is by the civil law eſteemed matrimony itſelf, for ſuch contracts the ſpiritual courts will compel them to celebrate in the face of the church. *Swinb. of Eſpouſals* 74. 2 *Salk.* 438. See BARON and FEME, FORCE and COMPULISON, JACTITATION, ALIMONY, and DIVORCE.

MATRIMONY. See MARRIAGE.

MAYHEM. This is the violently depriving another of the uſe of a member proper for his defence in fight, as a leg, an arm, a finger, an eye, or a foretooth; but the cutting off an ear, the noſe, breaking out a jaw tooth, or the like, are not mayhems at the common law. The party injured in a caſe of mayhem, may either bring an action of *treſpaſs vi et armis,* in which he will recover damages for his injury, or conſidering it as an offence againſt the public he may indict the offender, who ſhall be fined and impriſoned. 1 *Hawk. P. C.* 111.

By the 22 *and* 23 *Car.* 2. *c.* 1. called the Coventry Act, it is enacted, that if any perſon ſhall of malice aforethought, and by lying in wait, unlawfully cut or diſable the tongue, put out an eye, ſlit the noſe, cut off a noſe or lip, or cut off or diſable any limb or member of any other perſon, with in-

tent to maim or to disfigure him; ſuch perſon, his counſellors, aiders and abettors, ſhall be guilty of felony without benefit of clergy,

MENSA ET THORO. See DIVORCE.

MILL. If a man diverts the whole courſe of water from my watercourſe to my mill, I may have an action on the caſe againſt him. 1 *Roll. Abr.* 104.

Damage and injury are both neceſſary to create a right of action, ſo that if I have a mill, and my neighbour builds another mill upon his own ground by which the profit of my mill is diminiſhed, yet no action lies againſt him; for in building the mill on his own ground he does a lawful act. 1 *Roll. Abr.* 107. *Noy* 184. But it is otherwiſe if I have had a mill by preſcription on my own land, and another erects a new mill on his own land, by which the ſtream is drawn away from my mill, or is ſtopped, or too much water runs to my mill, by which I receive damage; for in ſuch caſes an action on the caſe lies againſt him. 1 *Roll. Abr.* 107. *Dyer* 248.

If J. S. by digging a ditch upon his own land diverts the water from the mill of J. N. it is lawful for J. N to go upon the land of J. S. and fill this up with the earth which was dug thereout, becauſe J. S. was himſelf the firſt wrongdoer. *Bro. Treſp. pl.* 186. 9 *Rep.* 55. 2 *Roll. Abr.* 565.

If a miller takes toll of corn whereof none ought to be taken, an action of treſpaſs *vi & armis* lies. *Bro. Treſp. pl.* 47.

MINISTERS of JUSTICE. The law dealing with ſuch an impartiality as pays no reſpect to perſons, makes every one obnoxious to it's penalties who by fraud or oppreſſion injure others; amd among the reſt thoſe who fit as miniſters of juſtice, though as to what is done in their judicial capacity they are for good reaſons highly favoured.

Judges are puniſhable for corruption; thoſe in Weſtminſter-Hall properly by impeachment in Parliament. 1 *Hawk. P. C.* 192. And inferior judges by information, attachment, &c.

But it ſeems agreed that no action on the caſe lies againſt a judge of a Court of Record for a wrong judgment, and if it appears to have been an error of his judgment he is ſubject to no proſecution whatſoever. 1 *Roll. Abr.* 92. *Palm.* 243. *See* 1 *Hawk. P. C.* 192. 2 *Hawk. P. C.* 4, 85.

No

No action lies againſt a judge of an inferior court for taking inſufficient bail. *Hutt.* 120.

If A. declares that he affirmed in a plaint of debt in the Court of B. againſt C. and thereupon cauſed C. to be arreſted, and that the defendant (being the mayor, town clerk, and goaler of B.) did conſpire to delay the plaintiff in his ſuit; and in peril of his debt had let C. go at large without taking any bail; this action lies; for the not taking of bail is not the cauſe of the action, but the conſpiracy. 1 *Leon.* 189.

If the bailiffs in ancient demeſne hold plea after the record is removed in bank, by which the tenant loſes his land there by recovery, he may have an action upon the caſe againſt him. 1 *Roll. Abr.* 92.

So it lies againſt the under-ſteward of a court-baron, for proceeding after an *habeas corpus cum cauſa* delivered. 3 *Leon.* 99.

Or againſt a clerk who having the cuſtody of a record ſuffered it to be altered. *Raym.* 53. 1 *Sid.* 77. 1 *Keb.* 28, 346.

If an eſcheator returns a falſe *office*, contrary to what was found by the jury, in prejudice of the party, an action upon the caſe lies againſt him, for in this he is barely an officer, and not a judge. 4 *Inſt.* 226. 1 *Roll. Abr.* 92.

If my ſervant is robbed, and a juſtice refuſes to examine him touching the robbery, by which I am damnified, and cannot proceed againſt the hundred, I may have an action on the caſe againſt him; for the examination by him in this caſe is not as a judge, but as a particular miniſter by the act appointed for that purpoſe. 1 *Leon.* 323.

If a ſumner of the eccleſiaſtical court falſely and maliciouſly, by colour of his office, to the intent to defame J. S. with incontinency with A. and to put him to expence cites him to appear for ſuch incontinency, upon which he appears, and is there charged with it, and upon his anſwer diſcharged, by which he is put to expence, J. S. may have an action upon the caſe againſt the ſumner upon ſuch a declaration, though he be an officer of the eccleſiaſtical court, inaſmuch as it is alledged that he cited him falſely and maliciouſly, and by colour of his office, it ſhall be intended that he did it without proceſs. 1 *Roll. Abr.* 94. *Cro. Car.* 291. 1 *Jones* 312.

So it does againſt church-wardens for ſuch a preſentment. *Roll. Abr.* 112. *Cro. Car.* 285. 1 *Jones* 305. 2 *Mod.* 52. 1 *Vent.* 86. 1 *Sid.* 463. 1 *Lev.* 92.

If a ſumner of the eccleſiaſtical court upon a premonition directed to him by that court, to warn J. S. to pay certain coſts there awarded againſt him, returns that he hath warned him, by which he is excommunicated, whereas in truth he never warned him, J. S. may have an action on the caſe againſt him for this falſe return, tho' he be an eccleſiaſtical officer; for the excommunication is a great damage to him as well temporal as ſpiritual, for as excommunicated he cannot bring an action, and is liable to an *excommunicato capiendo.* 1 *Roll. Abr.* 92. 2 *Bulſt.* 266. 12 *Co.* 127. 1 *Roll. Rep.* 63.

If an ordinary refuſe to grant adminiſtration, action on the caſe lies againſt him. *Cart.* 126.

If a *fieri facias de bonis eccleſiaſticis* of J. S. be directed to the biſhop of E. and he returns *quod nulla habet bona eccleſiaſtica*, which is falſe, an action on the caſe lies againſt him for this falſe return. 1 *Sid.* 276. 1 *Keb.* 947.

If a miniſter of juſtice having a warrant to attack the goods of another, can, and neglects to do it, an action on the caſe lies againſt him. 3 *Bulſt.* 212. *Moor* 432.

Or, if I ſhew J. S. to the ſheriff, and give him a writ to arreſt him, and he does not, an action on the caſe lies. *Cro. Eliz.* 873.

If on a *capias utlagatum* before judgment, the ſheriff neglects to extend or ſeize the goods and lands of the outlawed perſon, the party ſhall have no action, for it is the king's loſs; and tho' it was pretended, that the ſheriff extending and ſeizing would be a means to enforce the defendant to appear, the court ſaid that it was ſo remote, as not to be conſidered as a ground to ſupport an action; but if it had been ſhewn, that the ſheriff might have taken his body, there would have been more reaſon to ſupport the action. 2 *Ventr.* 90. See JUDGES.

MISADVENTURE. See HOMICIDE and MURDER.

MISLAYING. See BILL of EXCHANGE.

MISFORTUNE. Where a man doing a lawful act, does by mere misfortune any miſchief, he is conſidered as guiltleſs in the eye of the law, but it is otherwiſe where he was committing an unlawful act. 1 *Hal. P. C.* 39. See MANSLAUGHTER.

MISTAKE,

MISTAKE. If one pays money to another in miſtake, thinking there was ſo much due on account, &c. he may maintain an action of aſſumpſit for it. 1 *Salk.* 22.

So if a man pays money upon a policy of aſſurance ſuppoſing a loſs, when in truth there was none, he may bring an action of *indebitatus aſſumpſit*, for ſo much money received to his uſe. *Skin.* 412. 6 *Mod.* 161. And whether he parts with his money by miſtake, or through fraud in the receiver, it is the ſame thing. *Skin.* 412. 1 *Salk.* 22. See ACCIDENT, ASSUMPSIT, and IGNORANCE.

MORTGAGE. A mortgage is defined to be a pawn of lands or tenements, for money borrowed; to be the creditors for ever, if the money be not paid at the time agreed. But on the mortgagor's paying the intereſt of the money, mortgages are continued a long time, without diſturbing the poſſeſſion or parties.

'Till failure in payment of the money, the mortgagor uſually holds the lands; and if failure be made, whereby an entry is made by the mortgagee, yet the mortgagor hath an equity of redemption, and may call the mortgagee to account: and a covenant to reſtrain the equity of redemption, is not regarded in chancery: but the mortgagee may bar the equity of redemption, and oblige the mortgagor to pay what is due, or be foreclоſed; which the court of chancery will order in convenient time. *Litt.* 332. 1 *Inſt.* 205. 2 *Ventr.* 365.

The intereſt in lands mortgaged is, in law, in the mortgagee, before forfeiture; he hath purchaſed the lands as it were upon a valuable conſideration, as the law will intend; and though the mortgagor may redeem, yet it is not certainly known whether he will or not; and if he do not redeem, the eſtate is abſolute in the mortgagee, but ſtill ſubject to an equitable right of redemption by the mortgagor. A mortgagee is eſteemed in poſſeſſion, on executing the mortgage; and if the mortgage-money be not paid, whereby the land is forfeited, he may bring ejectment, without actual entry; but it is otherwiſe where a condition is to be defeated. *Mich.* 23 *Car. B. R.*

A mortgagor's heir, being intereſted in the condition, may pay the money and ſave the forfeiture; and ſo may the executors or adminiſtrators; but if no time be limited for the payment of the money, and the mortgagor having time during

during life to pay it, does not do it, his heirs, executors, &c. ſhall not be received to pay the money after his death. Executors are to have money due on mortgages, where a mortgagee in fee dies before the day of payment, except the heir be particularly named (as the executors do more repreſent the teſtator than the heir): and where the heir is named, if the day be paſt, it is as much as if no perſon had been expreſſed, and then the law appoints it to the executor. If heirs and executors are named, it may be paid to either. —Mortgages have been looked upon as part of the perſonal eſtate, unleſs a mortgagee in fee otherwiſe declare the ſame. And the perſonal eſtate of a mortgagor ſhall, in favour of the heir, be applied to diſcharge the mortgage, if there be perſonal aſſets to pay all legacies. 1 *Inſt.* 206, 210. 2 *Ventr.* 348. *Chanc. Rep.* 286. *Salk.* 450.

It is allowed in equity, that where lands are thrice mortgaged, the third mortgagee may buy in all the firſt incumbrance, to protect his own mortgage, and he ſhall hold againſt the ſecond mortgagee, unleſs ſuch ſecond mortgagee ſatisfy him the money he paid to the firſt, and alſo his own, which he lent on the laſt mortgage. So a purchaſer coming in upon a valuable conſideration, purchaſing a precedent incumbrance, ſhall protect his eſtate againſt any perſon that hath a mortgage ſubſequent. 2 *Ventr.* 338.

But by the ſtatute 4 *and* 5. *W. and M. c.* 16. if perſons having once mortgaged lands, mortgage the ſame a ſecond time, without diſcovering the firſt mortgage, they ſhall forfeit their equity of redemption, and the ſecond mortgagee may redeem, &c.

Mortgages are not relievable in chancery after twenty years, where no demand is made, or intereſt paid; except there appear particular circumſtances, as in caſes of infants, feme coverts, &c.

MURDER. Murder is the wilful killing of a man, upon malice forethought, and it may be committed in divers manners; as by weapon, poiſon, cruſhing, bruiſing, ſmothering, ſtrangling, drowning, &c.

It is malice which conſtitutes murder, and this is either expreſs or implied; *expreſs*, when it may be evidently proved there was formerly ill will, and the killing is with a ſedate mind, and formed deſign of doing it; *implied*, when the law implies enmity where none can be proved, as if one kills another

another ſuddenly, without any provocation, and the like, for he that doth a cruel and voluntary act, whereby death enſues, doth it of malice prepenſed, and forethought, in the eſteem of the law. If a perſon in cool blood, maliciouſly and deliberately beat another in ſuch a manner, beyond any apparent intent of chaſtiſement, that he dieth, it is murder, although he might not deſign to kill him. As if a maſter correct his ſervant with an iron bar, or a ſchoolmaſter ſtamps upon his ſcholar's belly, by which they die. And where one executes his revenge, upon a ſudden provocation, in ſuch a cruel manner, with a dangerous weapon, as ſhows a malicious intention to do miſchief, and death follows, it is expreſs malice, from the nature of the fact. If one being provoked by bare words, or geſture, makes a puſh at a perſon before his ſword is drawn, and thereupon a fight enſues, wherein he who made the aſſault kills the other, this is murder; but if he had made no puſh 'till the others ſword was drawn, it would have been only manſlaughter in the perſon killing. If one lays poiſon to kill a certain perſon, and another takes it and dies; or if having malice to another, ſtrikes or ſhoots at him, but miſſeth him and kills another perſon, theſe are murder. 3 *Inſt.* 51. *Hal. P. C.* 47, 49, 50. *Kel.* 64, 127, 133. *Kel.* 55, 61, 65, 130. 3 *Inſt.* 51. 9 *Rep.* 81. *Pult.* 122.

If one reſolves to kill the next man he meets, and does kill him, though he did not know him, it is murder, for here is manifeſted a general malice againſt mankind. Where two perſons fight after a former quarrel, it ſhall be preſumed to be out of malice; and if two men fall out in the morning, and meet and fight in the afternoon, and one of them is killed, this is murder, for their after-meeting is of malice. If a man upon a quarrel with another, tells him that he will not ſtrike firſt, but will give him a pot of ale to ſtrike him, and he kills the other, he is guilty of murder; this being only a cover to his malicious intention. Where one killeth another without provocation, malice is implied; as where a conſtable or watchman is killed doing his duty, or any other that comes in aid of the king's officer.

And it is murder if a bailiff is killed in executing a lawful warrant; but if the ſheriff doth that which is unwarrantable, (as if he break open a houſe to arreſt in civil caſes) and is ſlain, malice ſhall not be implied; and where a bailiff hath no authority it is no murder to kill him.

There

There are other caſes wherein malice is implied; as, when a priſoner dies by dureſs of a gaoler; if one is executed contrary to the direction of the law; or a perſon ſentenced to be whipped, is whipped with that rigour that he dieth of it. *Kel.* 27. *Plowd.* 4, 74. *Hal. P. C.* 48, 45. 3 *Inſt.* 51, 52. 9 *Rep.* 67. *Kel.* 60, 128, 130. *&c.* 2 *Cro.* 279. 3 *Cro.* 183.

If one aſſaults another to rob him, and by his reſiſtance kills him, this implies malice; if two or more come together to do an unlawful act, as to beat a perſon, rob a park, &c. and one of them kills a man, this is murder in all that are preſent, aiding and aſſiſting, or that were ready to aid and aſſiſt; and in this caſe all will be ſaid to intend the murder; and ſuch perſons will be conſidered as preſent that are in the ſame houſe, tho' in another room; or in the ſame park, though half a mile off. And ſo it is when death happens, where ſeveral perſons intend only a breach of the peace, if they agree to reſiſt all oppoſers; but in caſe of wounding, the death muſt enſue within a year and a day after the ſtroke or wound, &c. is given. And if one dies in that time, through diſorderly living, it ſhall be no excuſe; the wound will be judged the principal cauſe of his death; but if one wounded, die after that time, the law will preſume he died a natural death. 3 *Inſt:* 52. *Dalt.* 344. 3 *Inſt.* 56. *Dalt.* 347. *Hal. P. C.* 31, 47, 55. *Kel.* 87, 116, 127. 3 *Inſt.* 53. *Kel.* 26. 5 *Rep.* 1.

If a man has a beaſt that is uſed to do miſchief, and he knowing it, ſuffers it to go abroad, and it kills a man, this is manſlaughter in the owner; but if he purpoſely turns it looſe, tho' barely to frighten people and make ſport, it is murder; and ſo it is to incite a bear or a dog to worry a man by which he is killed. 1 *Hal. P. C.* 432.

If a phyſician or ſurgeon adminiſter phyſic, &c. which cauſes the death of a perſon, this is miſadventure; but it is pretended, that if the perſon be not regularly bred to the profeſſion, it will be at leaſt manſlaughter in him. *Mirr. c.* 4. *ſ.* 16. But ſee 1 *Hal. P. C.* 430.

To kill a child in its mother's womb is not murder, but a great miſpriſon; but it ſeems it is murder if the child be born alive, and afterwards die by reaſon of the wound or potion which was adminiſtred. 3 *Inſt.* 50. 1 *Hawk. P. C.* 80. But ſee 1 *Hal. P. C.* 433.

The

The puniſhment for murder, is death and diſſection of the offender's body, and by the ſtat. 25 *G.* 2. *c.* 37. the judge is to pronounce ſentence immediately upon conviction, and in paſſing ſentence ſhall direct him to be executed on the next day but one, unleſs Sunday intervenes. See DUELS, HOMICIDE and MANSLAUGHTER.

MONEY. If any of the money of J. S. which is not to be diſtinguiſhed from the money of J. N. has been illegally taken by J. N. it is not lawful for J. S. to take any money from J. N. for he cannot be in ſuch caſe certain that he takes his own money. *Bro. Treſp. pl.* 23. See SHOES and TIMBER.

N

NECESSITY. Perſons are not accountable to the law for acts done through unavoidable force; and therefore a wife is much favoured in the law. See BARON and FEME, and DURESS.

If perſons are forced by rebels, or an enemy in the time of war, to commit treaſonable acts, they are excuſed in the eye of the law. 1 *Hal. P. C.* 50. But offences of this kind muſt be ſuch as are made ſo by ſome poſitive precept, and which are not offences created by the law of God; for, if a man be violently aſſaulted, and has no proſpect of eſcaping but by killing an innocent perſon, this is murder. *Ibid.* 51. But in ſuch caſe he may kill his aſſailant, and be excuſed.

NEGLECT. If a perſon undertakes an employment, or duty, and engages to do it with diligence and ſkill, if he neglects to do it he is liable to an action on the caſe. See BATTERY.

NEGRO. It has been held, that as it is the conſtant practice to buy and ſell negroes in the plantations, the value of a negro, who has been taken from his maſter in *England*, may be recovered in an action. 2 *Lev.* 201. 3 *Keb.* 785. But in a later caſe it is laid down, that no man can have ſuch a property in a negro in *England*, as will entitle him to an action; and that he can only recover, as he may in the caſe of any other ſervant, damages for the loſs of his ſervice. *Ld. Raym.* 146. And it has alſo been held, that no man can have ſuch a property in a negro in *England*, as will entitle him to an action of trover for the taking of him. *Ibid.* 1274.

NON COMPOS MENTIS A perſon non compos mentis, is one not of ſound memory or underſtanding.

There

There are four ſorts of perſons non compos mentis. 1. An idiot, or natural fool, who is of unſound mind and memory from his nativity. See IDIOT. 2. A madman, or one who was of ſound memory, but hath loſt it by accident or misfortune. 3. A lunatic, or one who is ſometimes of ſane memory, and ſometimes not ſo. 4. A drunkard, that deprives himſelf of his memory and underſtanding for a time. But this laſt kind can take no advantage when he recovers his ſenſes, of any act done when in a ſtate of intoxication. 1 *Inſt.* 264, 247. 4 *Rep.* 124.

A man non compos mentis, ſhall not loſe his life for felony, or murder, but for treaſon he may. 3 *Rep.* 124. 3 *Inſt.* 4, 6, 54. See LUNATICS, and IDIOTS.

NOSE. See MAYHEM.

NUSANCE. Nuſances are either public or private: *public* where any thing is erected in the king's highway, as a gate, hedge, &c. or where ditches are dug therein, annoyances of rivers, bridges, &c. *Private*, by ſtopping up the lights of another's houſe, or building any thing ſo near that it is offenſive to him, or the ſmell thereof is ungrateful or infectious. 2 *Inſt.* 406. 3 *Inſt.* 231. 5 *Rep.* 101. 9 *Rep.* 5. *Danv. Abr.* 173.

For a common nuſance, an indictment lies; and for a private nuſance, an action on the caſe. But a common nuſance may be removed by thoſe perſons that are prejudiced by it; and they need not ſtay to proſecute for their remova And it has been adjudged, that any perſon may remove a nuſance, and that the cutting a gate ſet acroſs the highway is lawful. It has alſo been held that the erecting ſuch a gate, though it might be opened and ſhut with eaſe, is a common nuſance, the paſſage not being ſo free as before. If a ſhip be ſunk in a port or haven, it is a common nuſance if it be not removed, and the owner may be indicted for it. If a watercourſe running to a man's houſe be turned, or a perſon be interrupted in a private way, theſe are private nuſances. If a farmer erects a lime-pit where a man hath water running to his houſe for his neceſſary uſe, ſo that the corruption of the pit ſpoils the water; or if dye-houſes are erected, the filth of which deſtroys fiſh in a river; or if a tallow-chandler erects a furnace ſo near his neighbour that the ſtink annoys him; or if hogs are kept in any hog-ſtye near a man's parlour, whereby he loſes the benefit of it, theſe are private nuſances, for which an action on the c

lies. *Cro. Car.* 184, 185. 2 *Lill.* 244. 2 *Roll. Abr.* 137. *Cro. Car.* 570. 2 *Roll. Abr.* 140.

Though an action of the caſe lies not for a common nuſance, but an indictment; yet if any particular perſon hath more damage by it than others, as if a man and his horſe, or ſervant fall into a ditch, made in the highway, whereby he receives a particular injury, or loſes the ſervice of his ſervant; for this ſpecial damage, which is not common to others, an action may be brought. And where the inhabitants of a town, have a watering-place for their cattle, which is ſtopped by another, an action on the caſe lies againſt him at the ſuit of any inhabitant. 5 *Rep.* 73. 1 *Inſt.* 56. *Cro. Car.* 446. 9 *Rep.* 113.

The continuation of a nuſance, hath been adjudged to amount to a new nuſance. And where a nuſance is made in an houſe, walk, &c. to the prejudice of another, and then the houſe is aliened, an action on the caſe lies againſt him that cauſed it, and alſo againſt the alienee, for continuing it. 2 *Leon. ca.* 129. 13 *E.* 1. 24.

On an indictment for a common nuſance, the party may be fined and impriſoned; and on an action for a private nuſance, damages ſhall be recovered for the injury ſuſtained, and judgment given that the nuſance ſhall be removed. 5 *Rep.* 73, 101. 1 *Roll.* 391. 1 *Ventr.* 208.

Gaming-houſes, bawdy-houſes, diſorderly ale-houſes, ſtages for mountebanks, &c. common ſcolds, eaves-droppers, &c. are common nuſances. See HOUSE, and LIGHTS.

O.

OBLIGATIONS. Bonds made by a woman, where prevailed upon by flattery, &c. may by relieved in Chancery.—Where good bonds are loſt, on oath made of it, the Chancery will give relief for them. If the words at the end, *Then this obligation to be void*, are omitted, the condition will be void; but if the words, *Or elſe ſhall ſtand in force*, be omitted, it will not hurt. See BOND.

OBSTRUCTIONS of PROCESS. In the dark ages of Popery and ſuperſtition there were many places of ſanctuary where offenders might not only fly from juſtice in criminal offences, but where they were beyond the reach of legal proceſs; but

now, by ſeveral ſtatutes it is enacted, that perſons oppoſing the execution of any proceſs in ſuch pretended priviledged places within the bills of mortality, or abuſing any officer in his endeavours to execute his duty therein, ſo that he receives bodily hurt, ſhall be guilty of felony, and tranſported for 7 years; and perſons in diſguiſe joining therein ſhall be felons without benefit of clergy. 8 & 9 *W.* 3. *c.* 27. 11 *Geo.* 1. *c.* 22.

OPPRESSION. See MAGISTRATE.

ORGAN, damaging or taking away. See CHURCH-WARDENS.

OVERFLOWING. An action on the caſe will lie if one fills up a ditch, by reaſon of which the land of another is overflown, though the ditch was in the land of him who filled it up. *Ld. Raym.* 1402. *Str.* 636.

P.

PAPERS. See BOOKS and WRITINGS.

PARENT. See BATTERY.

PARISH-BOOKS. See CHURCH-WARDENS.

PARTIALITY. See JURY and MINISTERS of JUSTICE.

PAWNING. An action on the caſe lies where a man having pledged his goods, tenders the money, and is refuſed them.

PERJURY. This crime muſt be wilful and deliberate, not committed through ſurprize, inadvertency, or miſtake; and be falſe either in expreſs words or intention; and muſt be abſolute and direct, not as one thinks or believes, &c. It is to be in a judicial proceeding, and not in a private affair. It muſt be on a matter material to the iſſue; ſo that if it be not of any conſequence in deciding the cauſe, it is not to be puniſhed as perjury. And the oath is to be lawful, and taken before one that hath authority, or it ſhall not be perjury in law. 3 *Inſt.* 166, 167, 266. 2 *Roll.* 257. 11 *Rep.* 98. 1 *Cro.* 428, 500. 4 *Inſt.* 278.

Perjury at *common law* may be puniſhed by fine, impriſonment, pillory, &c. and the offender ſhall ever after be incapable to be a witneſs; but by the *ſtatute* 5 *Eliz. c.* 9. perſons committing wilful perjury are to forfeit 20l. ſuffer ſix months impriſonment, be diſabled to give evidence, and in default of payment to have both ears nailed to the pillory. And perſons ſuborning a witneſs to give teſtimony in a

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court of record, concerning lands or goods, are to forfeit 40l. or to ſuffer impriſonment for half a year, and to ſtand on the pillory with both ears nailed thereto. 3 *Inſt.* 163. The 2 *Geo.* 2. *c.* 25. gives the court power to commit the offender to a houſe of correction for any term not exceeding 7 years, or to tranſport him for the ſame period.

This ſtatute extends to no other perjury than that of a witneſs, and not to perſons who commits perjury in their anſwers in Chancery, in affidavits for the peace, &c. but they may be puniſhed at common law.

The uſual way is to proſecute the offender at common law, and not upon the ſtatute. See SLANDER.

PETIT TREASON. Petit treaſon is where one out of malice takes away the life of a ſubject to whom he oweth ſpecial obedience; as when a ſervant killeth his maſter, a wife her huſband, a ſecular or religious perſon his prelate, &c.

If a ſervant kills his miſtreſs, or the wife of the maſter, it is petit treaſon; but if a child killeth his father or mother, he is out of the ſtatute againſt petit treaſon, unleſs he ſerved either of them for wages, &c.

If a wife and her ſervant conſpire to kill the huſband, and the ſervant in the wife's abſence killeth him, it will be petit treaſon in both. If the wife or ſervant procure a ſtranger to kill the huſband or maſter in their abſence, it will be murder only in the procurer and actor; but if the wife or ſervant be preſent, they are guilty of petit treaſon. A ſervant procured another to kill his maſter, and he killed him in the ſervant's preſence, and it was adjudged petit treaſon in the ſervant, and murder in the other; but if the ſervant had been abſent, he would have been only acceſſary to it. 11 *Rep.* 34. 3 *Inſt.* 20. *Hal. P. C.* 24. *Dyer* 128, 332. *Moor* 91. 8 *Inſt.* 20. *Dalt.* 337.

Aiders and abettors are within the act, 25 *Ed.* 3. againſt petit treaſon; but if the killing is upon a ſudden falling out, or *ſe defendendo*, &c. it is not petit treaſon. *Hal. P. C.* 24.

Lands, tenements, goods and chattels, &c. are forfeited in petit treaſon as well as high treaſon; and a man is drawn on a hurdle and hanged, and a woman who has killed her huſband is ſo drawn and burnt. 1 *Inſt.* 37. 3 *Inſt.* 311.

PICKPOCKETS. See LARCINY.

PIT. If one dig a pit by which J. S. for whoſe life I hold

lands, be drowned, I may have an action on the caſe againſt him. 1 *Keb.* 847.

PLAINTIFF. Under this head we ſhall conſider who are the proper perſons to bring actions.

Debt.

Action of debt muſt be brought by and in the name of the party to whom the ſame is due, if he be living, and after his death by and in the name of his executors, and, if he died inteſtate, by his adminiſtrators, and if the executor be within age, the adminiſtrator appointed by the ordinary *durante minore ætate*, during ſuch non-age, muſt bring the action.

If one or more of the executors (who have taken upon them the executorſhip) die, then the ſurvivor or ſurvivors muſt bring the action; and if they be all dead it muſt be brought by the executor of the laſt ſurvivor.

If there be but one executor, and he dies after acceptance, the executor of that executor ſhall have an action, and ſo on *ad infinitum*: and if an executor die inteſtate, the adminiſtrator *de bonis non adminiſtratoris* muſt have it. *Dyer* 24, 471. 3 *Cro.* 9.

An heir cannot have this action as ſuch, but if he be appointed executor or adminiſtrator he may. *F. N. B.* 120.

If the debt was due to a biſhop, parſon, vicar, manager of an hoſpital, or the like, after his death his executors or adminiſtrators, and not his ſucceſſors ſhall have this action.

If it was due to a body politic, as to a mayor and commonalty, dean and chapter, or the like, in their politic capacity, there the ſucceſſors, and not the executor or adminiſtrator, ſhall have it. 4 *Co.* 65. *F. N. B.* 120. 34 *Ed.* 2. 9.

If a man leaſes for years, rendering rent, and afterwards deviſes the rent to another, and dies, the deviſee may have an action of debt, tho' it is become a rent ſeck, becauſe by the original creation of it debt lay. 1 *Roll. Abr.* 59.

So if a leſſor grants over the rent, and the leſſee attorns, for the attornment creates a privity; and there is no caſe where a thing may be transferred or aſſigned over, but the remedy ſhall go along with it; and the law favours remedies for rent. 1 *Leon.* 315. 2 *Leon.* 1. *vide Dyer* 149. *Cro. Eliz.* 895. And if a huſband, who is poſſeſſed of a term in right of his wife, makes a leaſe for half the term, and dies, his executors ſhall have debt for the rent, and yet the feme ſhall have the reverſion. *Co. Lit.* 46. Rent granted for life, te-

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nant dies, debt will lie, becauſe there is no other remedy. *Dyer* 227.

If the father grants a rent charge to the ſon in fee, and the rent being in arrear the father dies, and the land deſcends to the ſon, by which the rent is extinct, the ſon may charge the executors of the father, in an action of debt for the arrearages incurred in the life of the father; for tho' no action lies for them as for arrearages of an annuity; ſeeing both the annuity and rent are determined, yet the original election remains as to the arrears. 4 *Co.* 49. *a.*

If a bond be made to a wife during her coverture, conditioned to pay money to the wife, the huſband alone may bring an action upon this bond. 3 *Lev.* 403.

If a feme-ſole have 100 l. owing by bond, and afterwards having married dies, the huſbaud before he can recover muſt take out adminiſtration of the goods of the wife.

An annuity is granted to a woman for life, who after marries, the arrears of the annuity incur and the wife dies, whereby the annuity is determined, the huſband may have an action of debt. *Owen.* 3.

If a bond be entered into to a huſband and wife, the huſband may ſue it alone, and thereby he ſhews his diſſent to his wife taking any thing by it. 2 *Mod.* 217. *Ld. Raym.* 224. *Will. Rep.* 378, 458, 461.

Caſe.

If A. delivers goods to B. to be delivered over to C. C. hath the property, and conſequently is intitled to an action againſt B. 1 *Roll. Abr.* 606.

If a bailee deliver the goods to another, he may have an action of detinue againſt him, becauſe he hath the poſſeſſion, and undertakes for the cuſtody; and the original bailor may have his action againſt either of them, becauſe in him is the property which both are bound to anſwer to him. 1 *Roll. Abr.* 607.

Maſters, Servants, &c.

If a ſervant is cozened of his maſter's money, the maſter may have an action on the caſe againſt the cozener. 1 *Roll. Abr.* 98. *Cro. Jac.* 223.

So if a ſurgeon, in conſideration of a ſum of money, undertakes to cure my ſervant of a hurt, and he applies unwholeſome medicines, on purpoſe to make the wound worſe,

by which I loſe his ſervice for a long time, I may have an action on the caſe againſt the ſurgeon. 1 *Roll. Abr.* 98. 1 *Roll. Rep.* 124. 2 *Bulſt.* 332.

If a man gives money to his ſervant to carry to ſuch a place, and he is robbed, the maſter cannot bring caſe againſt him, for a ſervant only undertakes for his diligence and fidelity, and not for the ſtrength and ſecurity of his defence. 8 *Co.* 84.

But if A. is employed by B. to ſail from England to the Indies, and A. covenants, that he or his ſervants will not import thence any callicoes, &c. and A. retains C. as his ſervant in this voyage, and acquaints him with the covenants; and notwithſtanding C. falſely and fraudulently brings from thence certain callicoes, &c. A. ſhall have an action againſt C. for though no action lies by a maſter for the bare breach of his command, yet if a ſervant does any thing falſely and fraudulently to the damage of his maſter, an action will lie. 1 *Sid.* 298. 1 *Lev.* 188. 2 *Keb.* 88.

If A. delivers goods to B. to deliver over to C. and B. does not deliver them over accordingly, but converts them to his own uſe, either A. or C. may have an action againſt B. but not both of them, and he that firſt begins the action ſhall go on with it. 1 *Bulſt.* 68. *and Hard.* 321. it was ſaid they could not join.

Upon the contracts of teſtators or inteſtates an action on the caſe may be had either for or againſt executors and adminiſtrators, and alſo upon their own contracts.

If A. is ſeiſed in fee of the reverſion of a cloſe expectant upon a term for years, and B. is poſſeſſed of another adjoining cloſe, between which cloſes there runs a rivulet, and B. ſtops it, by which the cloſe of A. is ſurrounded, ſo that the timber, trees, &c. become rotten; A. in reſpect of the prejudice to the reverſion, and the termor in reſpect of the poſſeſſion, and of the ſhade, ſhelter, &c. may have an action; and ſatisfaction given to one is no bar to the other. 3 *Lev.* 209. *See* 2 *Roll. Abr.* 55.

If a maſter of a ſhip brings an action on the caſe, and declares that the ſhip was laden with corn in ſuch an harbour, ready to ſail for Dantzick, and that the defendant entered and ſeiſed the ſhip, and detained her, *by which he was impeded and obſtructed in his voyage, this* action will lie

lie by the maſter, for he has not the property of the ſhip, but the money; and he is only a particular officer, and can only recover for his particular loſs; yet he might have brought *treſpaſs* as a bailiff of goods may, and then as bailiff of the goods he could only have declared on his poſſeſſion, which is ſufficient to maintain treſpaſs. 1 *Salk.* 10.

If a bailiff errant takes J. S. in execution, upon a *capias ad ſatisfaciendum* at the ſuit of J. D. and after J. S. eſcapes by a reſcue of himſelf, the ſheriff may have an action upon the caſe againſt him for this eſcape, for he is thereby chargeable over for this to J. D. and this eſcape made to his bailiff was an eſcape to himſelf. 1 *Roll. Abr.* 97, 98. *Cro. Eliz.* 349.

But if ſuch a priſoner, taken by a bailiff of a franchiſe, eſcape from the bailiff, the ſheriff ſhall not have an action upon the caſe againſt him, becauſe he is not chargeable over; but the bailiff only is chargeable. 1 *Roll. Abr.* 97. *Cro. Eliz.* 26, 349. *Moor* 432.

If A. in conſideration that B. a married woman, will cure a certain wound, promiſes to her to pay her 10l. if ſhe does ſo cure it, ſhe may join with her huſband in an aſſumpſit for this money, for this promiſe ariſing upon a matter of ſkill, &c. of the wife, ſhe is the cauſe of the action; and ſuch an action will ſurvive to her. *Cro. Jac.* 77, 205. 1 *Sid.* 25.

And whatever the conſideration be, where there is an expreſs promiſe made to the wife ſhe may join. *Cro. Eliz.* 61. But without an expreſs promiſe it is otherwiſe; for the fruit and labour of the wife belongs to the huſband, for which he only ſhall bring the action. 1 *Salk.* 114. 4 *Mod.* 156. *Carth.* 251. *All* 3, 6. *Stile* 9.

Huſband and Wife.

In thoſe caſes where the debt or cauſe of action will ſurvive to the wife, the huſband and wife are regularly to join in the action; as in recovering debts due to the wife before marriage, and in actions relating to her freehold or inheritance, or to injuries done to the perſon of the wife. 1 *Roll. Abr.* 432.

And the husband alone cannot bring an *indebitatus aſſumpſit*, or an *inſimul computaſſet*, for a debt due to the wife before marriage. 1 *Sid.* 299. 2 *Keb.* 89.

But if a woman having a rent-charge, and rent in arrear, marries, and the husband diſtrains for this rent, and thereupon a reſcue is made, this is an injury to the huſband himſelf, and he may have an action alone. *Cro. Eliz.* 439. *Owen* 82. *Moor* 584. Or, he may join his wife therein, becauſe it ariſes upon a duty due to her before marriage. *Cro. Eliz.* 459.

So if a woman having a right to have common for life marries, and her husband is hindered in taking the common, he may have an action alone without his wife, it being only to recover damages. 2 *Bulſt.* 14.

But if a tenant for years burns the wife's houſe, regularly the husband and wife ſhould join, becauſe the damage is done to the wife's eſtate, &c. *Cro. Eliz.* 461.

If A. demiſes a houſe to B. for years, and B. covenants to repair the houſe during the term, and afterwards A. grants the reverſion to a husband and wife, &c. the husband may have an action alone on this covenant, for therein damages only are to be recovered. *Cro. Jac.* 319. 3 *Bulſt.* 163. 1 *Roll. Rep.* 359.

But if a husband and wife are diſſeiſed of the land of the wife, they muſt join in an action for the recovery of this land. 1 *Bulſt.* 21.

They muſt alſo join in detinue for charters concerning the wife's inheritance. 1 *Roll. Abr.* 347. And in trover for a deed by which a rent-charge was granted to her while ſingle, though it came to the defendant's hands ſince her marriage. *Noy* 70. As alſo for rent due to her before coverture as tenant in dower. 1 *Roll. Abr.* 318, 348.

If a husband be poſſeſſed of a rectory for years in the right of his wife, he and his wife may join in an action upon the 2 *Ed.* 6. for not ſetting forth of tithes; for the poſſeſſion of the husband is in the right of the wife, and the action is given by the ſtatute to the proprietor. *Cro. Eliz.* 608, 13. *Co.* 47. *Moor* 912.

If a ſtranger cuts trees upon the land of the wife they may join. *Litt. Rep.* 285. *Yelv.* 375. So they may join in treſpaſs *quare clauſum fregit.*

If A. conveys lands to B. in fee, and covenants with him, his heirs and aſſigns, to make further aſſurances, and theſe lands are aſſigned to J. S. and his wife, and the heirs of J. S. they muſt join in an action on the covenant for further aſſurances

aſſurances. 1 *Roll. Abr.* 348. *Cro. Car.* 503, 505. 1 *Jones* 406, 407.

Battery.

For a battery, or other perſonal injury done to the wife, they muſt both join, and if the wife dies, the action dies with her. 1 *Roll. Rep.* 360. *Ney* 18.

But not for perſonal or other wrongs done to them both, unleſs where they have a joint intereſt, and they have wrong in reſpect thereof. 2 *Roll. Rep.* 51. *Ld. Raym.* 669, 1031, 1050, 1061, 1208. 1 *Vent.* 328. 2 *Vent.* 29. 1 *Lev.* 3. 2 *Lev.* 20.

But the husband alone may bring an action for the battery, carrying away and detaining of his wife, *by which he loſt the comfort and company of his wife*; becauſe the action is founded upon the ſpecial damage done to himſelf, and will be no bar to another action brought by the husband and wife, or by the wife after the husband's death for the ſame battery. *Cro. Car.* 89, 90. 2 *Roll. Abr.* 556.

Where an action is brought for words ſpoken of, or other injury done to the wife, and is *founded upon the ſpecial damage of the husband*, ſhe muſt not join. 1 *Sid.* 346. 1 *Lev.* 140. See 2 *Stra.* 977. 2 *Barnard* 465. 8 *Mod.* 26.

In treſpaſs by husband and wife, they declared for a battery of the wife, and that the defendant *did other enormities to him*, and though it was objected the wife cannot join for a wrong done to the husband, yet becauſe the *other enormities*, &c. was but form, and only in aggravation of damages, and altered not the ſubſtance of the declaration, it was adjudged for the plaintiffs. *Cro. Jac.* 664. See *Stile* 202, 236. 1 *Sid.* 225. 1 *Salk.* 119.

So in treſpaſs and falſe impriſonment by husband and wife, *by which the domeſtic affairs* of the husband *remained undone to their great damage*; and it was objected that this being laid as a ſpecial damage done to the husband, the action ought to have been brought by him alone; but adjudged for the plaintiffs after verdict, being only matter in aggravation of damages. 1 *Salk.* 119.

In treſpaſs by husband and wife, for beating the wife, they may declare that it was *to their damage*, notwithſtanding a wife can have no damages; for this action will ſurvive. 1 *Sid.* 387. 2 *Keb.* 434. *Palm.* 339. 3 *Mod.* 120. So for words ſpoken of the wife. *March.* 212. So in debt upon a bond made to the wife whilſt ſole; for the non-payment to

her whilſt ſole was to her damage, as the non-payment ſince is to the damage of the huſband. *Stile* 134. Adjudged; and ſaid it is the uſual way of declaring in ſuch caſe.

If a ſon or daughter has been falſely impriſoned, only ſuch ſon or daughter can recover a ſatisfaction by action of treſpaſs for the perſonal injury. *Cro. Eliz.* 770.

If a ſervant has been beaten, no one except himſelf can maintain an action of treſpaſs for the injury done to his perſon by the battery. 2 *Roll. Abr.* 552. And although a maſter may, where his ſervant lawfully retained has been beat, bring an action of treſpaſs, he cannot recover any damage for the perſonal injury: for his recovery can only be for ſuch conſequential damage as he has ſuſtained by the ſervant's having been rendered by the battery incapable, or leſs capable to perform his ſervice. *Bro. Lab. pl.* 29. *Bro. Treſp. pl.* 131. 2 *Roll. Abr.* 552. See SERVANTS.

A married woman cannot maintain an action of treſpaſs for any perſonal injury done to herſelf, unleſs her husband joins with her in it.

The agiſtor of a beaſt may bring an action for the taking or injuring thereof by a ſtranger whilſt it is in his poſſeſſion, becauſe he is anſwerable for it to the owner. *Bro. Treſp. pl.* 67. *Moor* 543. And every perſon who is anſwerable to another for any perſonal chattel in his actual poſſeſſion, has ſuch a ſpecial property therein as enables him to bring an action of treſpaſs *vi & armis* for the taking or injuring thereof by a ſtranger. *Fitz. N. B.* 89, 92. 1 *Inſt.* 89. 4 *Rep.* 84. *Sid.* 438. 2 *Saund.* 47.

As to real property no perſon but he who has the poſſeſſion in fact of the real property to which an injury hath been done can maintain an action of treſpaſs *vi & armis* for the ſame; becauſe the ground of this action is the being diſturbed in the poſſeſſion of a thing, and the having a general property does not in this caſe, as it does in the caſe of a perſonal chattel, draw to it ſuch a poſſeſſion as is ſufficient to found this action upon. *Bro. Treſp. pl.* 38. *pl.* 303. *pl.* 346. 3 *Lev.* 209. *Latch.* 263. 2 *Bulſt.* 268.

A leſſee for years may maintain an action of treſpaſs for an injury done to the eſtate in his poſſeſſion by any perſon. 2 *Roll. Abr.* 551. *Sid.* 347. But a leſſee at will can only maintain this action where the injury done to the eſtate in his poſſeſſion has been done by a ſtranger. *Ibid.*

Trover.

Trover.

In trover by husband and wife, they declare, *that whereas they were poſſeſſed*, &c. and that the defendant converted *to their damage*, this is naught after verdict; for the poſſeſſion of the wife is the poſſeſſion of her husband, and ſo is the property; ſo that the converſion cannot be to the damage of the wife, but of the husband only. 1 *Salk.* 114.

Eſcape.

Husband and wife ſhall join in an action for the eſcape of one in execution for a debt to the wife. 2 *Stra.* 726.

Slander.

An alien born under a king or ſtate in amity may have this action, becauſe he is intitled to perſonal actions. 1 *Bulſt.* 134. *Yelv.* 198.

If one ſlander two or more men at one time, they may not join, but muſt have ſeveral actions. 1 *Roll. Abr.* 75. 1 *Cro.* 368. *Dyer* 19. *Goldſb.* 76. *Cro. Car.* 512.

If the ſlander be both againſt a man and his wife the huſband may ſue one action alone for his own ſlander, and he and his wife may after join in another action for the ſlander of his wife; and if the wife alone be ſlandered it is beſt to join the husband and wife. *Stiles Rep.* 113, 161. But where an action is brought for words ſpoken of, or other wrong done to the wife, and is founded on the ſpecial damage of the husband ſhe muſt not join. 1 *Sid.* 346. 1 *Lev.* 140. See 2 *Stra.* 977. 2 *Barnard* 465. 8 *Mod.* 26.

If two have an office jointly, and a ſlander be of one of them in relation to his office, he muſt bring his action alone. *Winch.* 21. *Rep.* 40.

If one ſay all the jury are forſworn, every juror may have this action againſt him, but they muſt ſue ſeverally. *Mich.* 7 *Jac. C. B. Deamen's Caſe.*

POLIGAMY. Is the having many wives at once, as bigamy is the having two wives. See MARRIAGE. This crime is felony, but with benefit of clergy. 1 *Jac.* 1. *c.* 11. In theſe caſes the firſt wife cannot be an evidence, but the ſecond may. Where the parties are abſent from each other for 7 years, whether in England or abroad, the one having no notice of the other being alive, there a ſecond marriage is void only.

POSSIBILITY of DAMAGE. It has been held that for a poſſibility of damage an action will lie. 2 *Vent.* 26, 27. Yet the doctrine in ſome caſes is againſt this. *Idem.* 28. For

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if a man forges a bond in my name, here is an apparent poſſibility of my receiving damage; but 'till the bond be put in ſuit againſt me I cannot bring an action againſt the forger. *Hob.* 267. 6 *Mod.* 46. 2 *Bulſt.* 1. 268.

But if A. ſells ſheep to B. affirming them to be his own, whereas they belong to C. B. may have an action againſt A. for this deceit, before C. hath ſeized the ſheep, or interrupted him, becauſe they are things tranſitory, and therefore the action lies before interruption; for if he ſhould ſtay 'till C. interrupted him, he may be dead before, or other diſadvantage may happen. 1 *Roll. Abr.* 98 *Cro. Jac.* 474.

If A. recovers in debt againſt B. and thereupon a *capias ad ſatisfaciendum* is directed to the ſheriff to take B. in execution, which is accordingly done, and after B. reſcues himſelf, by which the ſheriff is liable to anſwer for the debt, here the ſheriff may have an action againſt B. before A. ſues the ſheriff; for the reſcue and eſcape wrongs to the ſheriff, and he is always chargeable to A. for it; and if the ſheriff muſt ſtay 'till ſued by A. B. may in the interim die, or fly his country. *Cro. Eliz.* 53, 123.

Post. If two are conſtituted poſtmaſters-general, by letters patent, purſuant to the 12 *Car.* 2. *c.* 35. and in the patent there is a power to make deputies, and appoint ſervants at their will and pleaſure, and to take ſecurity of them in the name and to the uſe of the king, and that they the poſtmaſters-general ſhould obey ſuch orders as from time to time ſhould come from the king; and as to the revenue, ſhould obey the orders of the treaſury; and it is further granted to them, that they ſhould not be chargeable for their offices, but only for their own voluntary faults and misbehaviour, and this is granted with a fee of 1500l. *per annum*, and A. having Exchequer-bills, incloſes them in a letter directed to B. at Worceſter, and delivers it at the Poſt-office, at *London*, into the hands of J. S. who was appointed by the poſtmaſter-general to receive letters, and had a ſalary. By three judges againſt Holt Chief Juſtice, the poſtmaſters-general are not liable. 1 *Salk.* 17, 143. 5 *Mod.* 455. 2 *Mod. Ent.* 108. *Ld. Raym.* 646. 12 *Mod.* 475. See *Carth.* 487. & 1 *Salk.* 17, 18. where Holt held that J. S. was chargeable, yet not as an officer, but as a wrong-doer.

Power of Attorney. See Authority.

Preaching. If A. B. preaches in the church of C. D. an action of treſpaſs *vi et armis* lies. 12 *Mod.* 420.

Presumptive

PRESUMPTIVE EVIDENCE. See EVIDENCE:

PRINCIPAL and ACCESSARY. A principal is the principal agent that actually commits any crime, and the acceſſary is he who is aſſiſting him in the doing it, or that conceals him after done.

In felony acceſſaries are either before or after the fact; before, where one adviſes or procures the felony, but is abſent when done; after, when a man receives, or aſſiſts any one that hath committed felony knowing the ſame. He that is preſent and aiding to the ſtabbing of another, is not a principal, but an acceſſary to the ſtabbing, within the ſtatute of 1 *Jac.* 1. which extends only to him which actually gave the ſtroke, &c. He who counſels or commands any unlawful act, ſhall be adjudged acceſſary to all that follows upon it; as if it be to beat another, and he is beat ſo that he dies, &c. A ſervant may be acceſſary in relieving his maſter, or aſſiſting him in his eſcape: a husband receiving his wife will make him acceſſary; but where the husband commits felony, if the wife receives him ſhe ſhall not be acceſſary. Perſons furniſhing others with weapons, finding a felon a horſe for his journey, or relieving him with money, victuals, &c. will make them acceſſary. Clergy is taken away from acceſſaries before the fact, in murder, robbery, burglary, petit treaſon, witchcraft, ſtealing women having lands, &c. 1 *Inſt.* 57. *Hal. P. C.* 58, 218, 219. *Plowd.* 475. 3 *Inſt.* 108, 138.

By the Common Law, if a principal be pardoned before judgment, or hath his clergy, the acceſſary may not be tried; but if it be after attainder, the acceſſary ſhall be arraigned. Where the principal dies before attainted, or is acquitted by verdict, &c. the acceſſary ſhall be diſcharged. And if the principal appears not, though the acceſſary may be put to anſwer, he ſhall not be tried 'till the principal is attainted. 4 *Rep.* 43. *Hal. P. C.* 47. *Dalt.* 339.

By the ſtatute 1 *Ann. c.* 9. if any principal ſhall be convicted of felony, or ſtand mute, or challenge above 20 of the jury, it ſhall be lawful to proceed againſt the acceſſary, before or after the fact, in the ſame manner as if the principal had been attainted; and notwithſtanding ſuch principal felon ſhall be admitted to clergy, be pardoned, &c. before attainder, and the acceſſary ſuffer as if the principal were attainted.

PRISON and PRISONERS. If a man being committed to the goal, the goaler of malice puts upon him ſo many irons, or otherwiſe uſe him ſo hardly, that he become lame thereby, an action on the caſe is ſaid to lie. *Finch. Law. p.* 187.

Every place where a man is reſtrained from his liberty is a priſon.

When a perſon is taken upon a proceſs, he is to be committed to priſon, or be bound in a recognizance with ſureties, or give bail according to the nature of the caſe, to appear at a day in court, to anſwer for his ſuppoſed offence, &c. If one is brought before a Juſtice of Peace for felony, if a felony has been committed, and the party is only ſuſpected, the juſtice muſt commit him to priſon, or bail him; but if no felony be done, he is to diſcharge him. And where a perſon is committed to priſon for treaſon, felony, &c. he cannot generally be diſcharged 'till indicted and acquitted; though one taken and committed to priſon in a civil action, may be releaſed and ſet at liberty by the plaintiff. *Dalt.* 421, 422. 3 *Inſt.* 209. *Hal. P. C.* 94, 95, 98.

An offender who is to be conveyed to priſon ſhall bear all the charges of it; if he refuſes, the conſtable of the place where he hath goods, by virtue of a warrant from a juſtice of the peace, may ſell ſo much of his goods as ſhall be ſufficient to ſatisfy the charges: and if the offender hath no goods, the conſtable, church-wardens, &c. are to make a tax upon every inhabitant of the pariſh to pay the charge but while he is in priſon the gaoler is bound to give him ſuſtenance, and muſt not ſuffer him to die for want. 3 *Jac.* 1. *c.* 10. 1 *Inſt.* 295. 9 *Rep.* 87.

A priſoner for the king ſhall not be charged in any action at the ſuit of a party, without obtaining leave of the court. Every judge of the King's Bench may ſend priſoners with their indictments to the place where the crimes were committed: and the court of King's Bench may ſend for a priſoner out of the Marſhalſea court by rule of court, without *habeas corpus*, ſeeing that priſon belongs to this court; but they cannot ſend for a priſoner out of any other priſon but by writ of *habeas corpus*. 1 *Lev.* 125, 146. 2 *Litt.* 357. *Roll. Mich.* 1650. *Dyer* 275.

If a perſon, when lawfully committed for any treaſon or felony, breaks the priſon and eſcapes, it is felony at the Common Law. 1 *Hal. P. C.* 607. And to break a priſon when lawfully confined on any other inferior charge is puniſhable

niſhable upon indictment with fine and impriſonment. 2 *Hawk. P. C.* 128.

PRIVILEDGE. If the ſheriff of the county, or his bailiff, executes a writ in a franchiſe or liberty of one who by grant or preſcription hath the return of writs, an action on the caſe lies. 9 *Co.* 28. 1 *Vent.* 399. 1 *Show.* 17. *Comb.* 198.

Actions on the caſe are proper remedies for diſturbance of a man in the peaceable enjoyment of his right or priviledge.

If the beadle of an hundred ought to have by preſcription certain gallons of beer of every brewer at a certain price, by virtue of his office, if the brewer will not ſuffer him to have it accordingly, an action on the caſe lies. 1 *Roll. Abr.* 106.

If a man diſturbs my ſteward in holding my leet, an action on the caſe lies againſt him; or if the lord's ſervants are diſturbed in collecting his tithes; or if a man have leet and other courts from time whereof the memory of man, &c. in a manor and vill, and there are not to be other courts within the vill. If a ſtranger holds a court within the vill, and empoveriſhes them by often diſtraining, that they cannot pay their rents, an action on the caſe lies. 1 *Roll. Abr.* 106. 13, 107.

PRIVY-HOUSE. If a privy-houſe is built ſo near my houſe that the ſmell thereof annoys me, an action on the caſe lies.

PROBABLE PRESUMPTION. See EVIDENCE.

PROFANENESS. Perſons guilty of blaſphemy againſt God, or of contumelious reproaches of the Lord Jeſus Chriſt, or of profane ſcoffing at the holy ſcripture, are puniſhable at the Common Law by fine and impriſonment, or other corporeal puniſhment. 1 *Hawk. P. C.* 7.

PROMISE. See AGREEMENT and ASSUMPSIT.

PROMISSORY NOTE. See BILL of EXCHANGE.

PROSECUTION MALICIOUS. See MALICIOUS PROSECUTION.

PROTEST. See BILL of EXCHANGE.

PROVISIONS, UNWHOLSOME. See SALE.

R.

RAIN. If a man builds a houſe ſo near mine as to cauſe the rain to fall upon my houſe, an action on the caſe lies againſt him. 1 *Roll. Abr.* 107. 2 *Leon.* 93. 22 *H.* 6. 14.

RAPE. Rape is the carnal knowledge of, or violent deflowering

ing a woman againſt her will, which is felony both by the common and ſtatute law.

In theſe caſes a woman raviſhed may proſecute, and be a witneſs in her own cauſe. It is no excuſe that the woman conſented after the fact; or before, if it was for fear of death or impriſonment; nor is it any excuſe that ſhe was a common ſtrumpet, but it is a ſtrong preſumption againſt the woman that ſhe made no complaint in a reaſonable time after the injury, and the law mentions 40 days. And if ſhe conceive it is ſaid to be no rape. 3 *Rep.* 37. 1 *Inſt.* 123. 3 *Inſt.* 59. *Hal. P. C.* 117. 2 *Inſt.* 190.

There muſt be penetration and emiſſion to make this crime. If there be no penetration and emiſſion it will be an aſſault only.

Aiders and abettors in committing a rape may be indicted as principal felons. See CARNAL KNOWLEDGE, and FORCE.

RASURE. See ALTERING of DEEDS.

RECORD. To vacate or embezzle a record in the ſuperior courts of juſtice, is felony not only in the principal actors, but alſo in their procurers or abettors. 8 *H.* 6. *c.* 12.

REGRATORS. Regrators are thoſe who buy corn, or any other dead victual, in fairs or markets, and ſell them again in the ſame market, or place, or within four miles thereof. 3 *Inſt.* 195. 5 & 6 *E.* 6. *c.* 14.

This is a kind of huckſtry, by which goods are made dearer, to the oppreſſion of the people, as every ſeller will gain ſomething, and is puniſhable by a diſcretionary fine and impriſonment. 1 *Hawk. P. C.* 235.

RENT. If one receives my rent under pretence of title, I may have an action of *indebitatus aſſumpſit* againſt him. 2 *Mod.* 263. It was then ſaid that wherever an action of account lies an *indebitatus* will lie; but *Q.?*

If in an action on the caſe the plaintiff declares that he having ſet to the defendant a certain warehouſe, the defendant promiſed to pay J. S. for every week he occupied the ſame and avers that he occupied the ſame for 27 weeks, and has not paid, &c. the action lies, for this is not a rent, but a mere promiſe in conſideration of occupation. *Cro. Jac.* 598. See ACCEPTANCE, COVENANT, and DISTRESS.

RENT-CHARGE. See ANNUITY.

REPAIRS. If A. hath an upper room, and B. an under room

room, and A. neglects to cover the upper room, B. may have an action on the case against A. and thereby compel him to cover his upper room for the preservation of the timber of the under room; and in like manner A. may enforce B. to support his under room for the preservation of the upper room. *Keilw.* 98. *F. N. B.* 127. 2 *Leon.* 95.

REPLEVIN. Replevin is grounded upon distress, and is a redeliverance of the thing distrained, that it may remain with the first possessor, on security given by him to try the right with the distrainer, and answer the same at law; and if he pursue not his action, or it go against him, then he that took the distress shall again have the distress, by writ *retorno habendo*. 1 *Inst.* 145, 161.

In replevin the defendant may either avow or justify; but if he justifies, he cannot have a return, as he shall have if he avows. As to avowry for rent, &c. on replevin, *vide* the statutes, 21 *H.* 8. *c.* 19. 32 *H.* 8. *c.* 37. & 17 *Car.* 2. *c.* 7. And how the plaintiff is to proceed in replevin, *vide* 4 & 5 *Ann. c.* 16. 3 *Lev.* 204. See FENCE.

RESCUE. A rescue of a prisoner from a court of justice, without striking a blow, is punished with perpetual imprisonment, and forfeiture of goods, and of the profits of lands during life. 3 *Inst.* 140, 141.

A rescue of one apprehended for felony, is felony; for treason, treason; and for a misdemeanor, a misdemeanor; but the principal must first be attainted before the rescuer can be punished. 1 *Hal. P. C.* 607. *Fost.* 344.

Persons rescuing may be either indicted, or have an action brought against them. If a rescue is made where a man is arrested on a mesne process, the plaintiff may have his action against the rescuers, but not against the sheriff; but where a person taken on an execution is rescued, an action lies as well against the sheriff as the rescuers. See POSSIBILITY of DAMAGE.

RESTITUTION of STOLEN GOODS. On a conviction of larceny the prosecutor shall have restitution of his goods by the 21 *H.* 8. *c.* 11. See CRIMINALS.

RETAINER of SERVANTS. See SERVANTS.

RIOT. A riot is where three or more actually do an unlawful act of violence either with or without a common cause, or quarrel, or indeed a lawful act, as the removing of a nuisance, if it be done in a tumultuous manner, the punishment

ment of which is a fine and impriſonment, and ſometimes the pillory. 1 *Hawk. P. C.* 159.

RIVER. See NUSANCE.

ROBBERY. If a thief bids the party to deliver his money, either with or without weapon drawn, and he delivers it; or if a perſon, with a ſword or piſtol drawn, bids me deliver my money, and afterwards prays me to give him alms, and I give it accordingly; or if a thief compels me by fear to ſwear that he will fetch him a ſum of money, which he doth, and the thief receives it; theſe are ſuch takings as conſtitute robberies in the eye of the law. Where a thief cuts a man's pocket, whereby his purſe falls to the ground, if he takes up the purſe it is robbery though he lets it fall again; ſo if a thief takes the purſe of a perſon which in a fright he caſts into a buſh; and if a man endeavouring to eſcape from a robber drops his hat, &c. which the highwayman takes up, it is a taking from the perſon. 3 *Inſt.* 60. *Dalt.* 363.

Not only taking away a horſe which a perſon is actually riding, but if the horſe be ſtanding by him, or any other thing belonging to him in his preſence, be taken againſt his will, it is in law a taking from the perſon, and a claim of property without colour, will not excuſe it. But if one leaves his horſe tied, and ſteps aſide, or if a carrier follows his horſe at a diſtance, the taking them is not a taking from the perſon to be robbery. A ſervant robbed in the ſight of the maſter, of his maſter's goods, is adjudged a robbery of the maſter. All that come in company to rob are principals, and eſteemed to take away, though one only doth it; and although one of them rides from the reſt, and robs in the ſame highway out of their view, if he afterwards returns to them. *Dalt.* 364. *Pult.* 128. *Cromp.* 34. 1 *And.* 116. See ATTEMPT and LARCINY.

ROUT. A rout is where three or more meet upon a common quarrel; as, to break down fences upon a right claimed of common, way, &c. for which the puniſhment is the ſame as in caſe of a riot, *Bro. Abr. Tit. Riot.* 4, 5.

S.

SACRILEGE. Sacrilege is where a perſon ſteals any veſſels, ornaments, or goods of the church: it is a robbery of wha

is dedicated to the ſervice of God. The common law diſtinguiſhed this crime from common robberies, as it denied the benefit of clergy to the offenders, which it did not to other felons. But by ſtatute it is rendered equal with other felonies, in the excluſion of clergy from the offender. 3 *Cro.* 153, 154. 2 *Inſt.* 150. 23 *H.* 8. *c.* 1. 1 *E.* 6. *c.* 12. 5 & 6 *E.* 6.

SALE of Goods. A ſale is a transferring of the property of goods and chattels from one to another upon valuable conſideration: and it can never be without a conſideration.

A man may at any time ſell his goods, though he fears an execution for debt, unleſs there is a private truſt between the parties, and the writ of execution be delivered to the ſheriff, &c.

A man ſhould never deliver his goods himſelf, for by this means he puts it out of his power to prove their delivery.

If a bargain is that one ſhall give 5l. for a horſe, and any thing be given and accepted in earneſt, this is a perfect ſale. If I ſay I will ſell my horſe for 5l. and another ſays he will give me 5l. and preſently go to tell out the money to pay for it, this will be a ſale, and I cannot ſell my horſe to any other; but if he do not pay me preſently it is no contract. On ſale of a horſe it may be kept till paid for; and if the horſe dies after ſold, and before the delivery, the ſeller may have an action for the money, the property being in the buyer.—On the ſale of goods in a ſhop, &c. the ſeller may not bring an action for the money agreed upon until the goods are delivered. *Noy's Max.* 87, 88. *Hob.* 41.

A perſon recommending a ſtranger to a ſhopkeeper, who thereupon ſells goods on truſt to ſuch ſtranger, may, by the law of merchants, make himſelf liable to the payment. And if a ſtranger of Holland, or any other nation, buys goods at London, and gives a note under his hand for payment, and then flies into Holland, the ſeller may have a certificate from the Lord Mayor, on proof of ſale and delivery of the goods, upon which the people of Holland will execute a proceſs on the party. If a perſon of England flies into another kingdom he may be taken up at the inſtance of our ambaſſador or conſul, and ſent over hither. 2 *Cro.* 4. 386, 630. 1 *Roll. Abr.* 97. 4 *Inſt.* 38.

Where one agrees for wares ſold, the buyer muſt not carry them away before paid for, except a day of payment is allowed him by the ſeller. *Noy* 87.

When a man comes to buy goods, and a price is agreed

on, and a day for the payment, and the buyer takes them away, an action of aſſumpſit for the money is the proper action, for an action of trover will not lie for the goods, becauſe the property was charged by a lawful bargain, and by that bargain the buyer was to convert the goods before the money was due; but if a man comes to buy goods, and they agree upon a price for ready money, and the buyer takes the goods away without payment, an action of trover lies, becauſe the property is not altered, and therefore the taking away the goods without payment of the money is an injurious taking, for which the action lies: but if a man ſells goods, on condition of payment at a day to come, and the money be paid and the goods are not delivered, an action of trover lies, beacuſe the property is in the buyer. See BILLS of EXCHANGE, TROVER, and MARRIAGE.

In ſales there are warranties *expreſſed* and *implied*.

1. An *expreſs* warranty is where upon transferring the property of any thing from one to another the vendor expreſsly warrants or aſſures the vendee, at the time of the the ſale, that the thing ſold is of ſuch a quality or value; and where this is the caſe, if the thing ſold be of an inferior quality, or leſs value, an action lies, for the warranty is (and as Sir Henry Finch has well obſerved *muſt be*) a part of the contract. 2 *Cro.* 4. 386, 630. 1 *Roll. Abr.* 97. But in this caſe the warranty cannot be made after the ſale. *Bridg.* 127. *Godb.* 31. 1 *Salk.* 211.

Thus, A. being a goldſmith, and having ſkill in jewels and precious ſtones, had a ſtone which he affirmed to be a Bezoar-ſtone, and ſold it to B. for 100l. whereas in truth it was not ſuch a ſtone; it was reſolved by all the juſtices that an action would not lie; for the bare affirming of it to be a Bezoar-ſtone, without warranting it to be ſo, was no cauſe of action; and every one in ſelling his wares will affirm that his wares are good. *Cro. Jac.* 4. 196.

But it is ſaid that if A. has a commodity (as victuals, &c.) that is corrupt, and knowing it to be ſo, ſells it for good, and affirms it to be ſo, an action lies for this deceit; yet if it be corrupted and he knows it not, though he affirms it to be good, no action lies, unleſs he warrants it to be ſo. *Cro. Jac.* 469, 2 *Roll. Rep.* 5.

And if a man ſells a tun of wine, and warrants it to be ſound and not corrupted, an action upon the caſe lies, though it be not paid for, for the vendor may have debt for

his money. 1 *Roll. Abr.* 96. 11 *H.* 6. 18. *F. N. B.* 94. *Poph.* 143.

Or ſells certain packs of wool, and warrants that they are good and merchantable, if they are damaged action of the caſe lies. 1 *Danv.* 187.

If A. ſells ſheep, and warrants that they are ſound at the time of the ſale, and that they ſhall continue ſo for a year after, this is a good warranty, and an action will lie. 1 *Danv. Abr.* 188, 96. 1 *Roll. Abr.* 97.

If a man ſells a horſe, and warrants him to be ſound of his wind and limbs, if he is not an action upon the caſe lies. 1 *Roll. Abr.* 96. 11 *H.* 6. 18. But without ſuch a warranty no action lies. 1 *Roll. Abr.* 90.

If A. knowing his horſe to be lame and foundered, offers him to B. to buy, and warrants him to be ſound, &c. and B. relying upon this warranty buys him and is deceived, though in this caſe the warranty was before the ſale, and the general rule is that it ſhould be made at the time of the ſale; yet as this was the cauſe of the ſale, it was held that an action on the caſe would lie. 1 *Roll. Abr.* 96. Yet ſee *Cro. Jac.* 4. 196, 197, 630.

If A. ſells a horſe to B. and warrants him to be ſound of wind and limb, and clean of his legs, whereas he well knows that he is ſhoulder-pitch'd, and has ſplints upon his legs, an action lies againſt him upon this warranty, for theſe imperfections are not ſubject to the view of an unſkilful perſon. 1 *Roll. Abr.* 97. 2 *Roll. Rep.* 188. But Q. of the warranty of a horſe that is blind? 2 *Roll. Rep.* 5. *Bridg.* 128. Diverſity where he has no eye, and where a counterfeit, falſe and bright eye; and vide *Cro. Jac.* 387. 3 *Bulſt.* 95. 3 *Keb.* 101. *Bro. Deceit* 29, *Fitz. Deceit* 23.

The plaintiff declared that the defendant ſold him a horſe ſuch a day and place, *& adtunc & ibidem warrantizavit equum prædict.* to be ſound wind and limb, whereupon he paid his money, and avers the horſe had but one eye, &c. The defendant pleaded *non warrantizavit*, upon which there was a verdict for the plaintiff; and in arreſt of judgment it was objected, 1. That the want of an eye is a viſible thing, whereas the warranty extends only to ſecret infirmities; but to this it was anſwered and reſolved by the court, that this might be ſo, and muſt be intended to be ſo, ſince the jury have found the defendant did warrant. 2. It was objected, that as the warranty is here ſet forth it might be

at a time after the ſale, whereas it ought to be part of the very contract, and therefore it is always alledged *warrantizando vendidit*; but this was not allowed, for the payment was afterwards, and this completed the bargain, which was imperfect without it. 1 *Salk.* 211. See ASSUMPSIT.

2. An *implied* warranty is where no expreſs warranty at the time of buying or ſelling is made, and the law ſupplies the defect by an implication of warranty.

If A. ſells a quantity of wine to B. (knowing it to be corrupt) as ſound and good, and not corrupt without any expreſs warrant, ſtill an action of deceit lies againſt him, for this was a warranty in law. *Roll. Abr.* 90.

So, if a man takes goods tortiouſly from J. S. and ſells them to another for money as his own proper goods, and afterwards J. S. takes them from him, the vendee may have his action upon the caſe againſt the vendor. *Idem.*

If there be a communication between A. and B. for the buying of certain ſheep, and upon this B. the vendor ſays they are his own ſheep, when in truth they are the ſheep of another; and upon this A. buys them of B. here though B. made no expreſs warranty of the ſheep, yet an action upon the caſe in nature of a deceit lies againſt B. 1 *Roll. Abr.* 90. *Cro. Jac.* 474.

In an action for fraudulently ſelling to the plaintiff an horſe that was not the defendant's own proper horſe, the plaintiff muſt prove that the defendant knew him not to be his own horſe. *Allen* 91. 1 *Keb.* 523. but *Quære? and vide Carth.* 90. *and per Holt Ch. Ju.* That one having poſſeſſion of a perſonal chattel ſells it, the bare affirming it to be his amounts to a warranty, and an action lies on the affirmation; for his having poſſeſſion is a colour of title, and perhaps no other title can be made out. *Aliter* where the ſeller is out of poſſeſſion, for there may be room to queſtion the ſeller's title, and the purchaſer muſt look to it, in ſuch caſe to have either an expreſs warranty, or a good title. 1 *Salk.* 210.

So if the vendor affirms that the goods are the goods of a ſtranger his friend, and that he has an authority from him to ſell them to him, and upon this B. buys them, when in truth they are the goods of another; yet if he ſold them fraudulently and falſely upon this pretence of authority, though he did not warrant them, and though it is not averred that he ſold them, *knowing them to be the goods of a ſtranger*,

ſtranger, yet B. ſhall have an action upon the caſe for this deceit.

In an action upon the caſe, by A. againſt B. if the plaintiff declares *that the defendant craftily intending to deceive and cozen the plaintiff, offering to ſell a gelding to the plaintiff, affirmed to him that he brought up that gelding of a colt, and that the ſaid gelding was then his own; upon which affirmation the plaintiff being ſeduced, and giving credit thereto, afterwards (that is to ſay) upon the ſame day and year, and at the place aforeſaid, did buy the ſaid gelding, &c. the ſaid gelding being the gelding of J. S. who afterwards took the ſame away, &c.* the action lies upon this declaration, though there was no warranty upon that ſale, for this was an apparent deceit, contrary to his own knowledge; and though it is not averred that he ſold him at the ſame time that he affirmed *he had him of a colt*, but that he *afterwards*, the ſame day and year, bought him, *giving credit thereto*, this ſhall be intended immediately after the ſpeaking of the words, for all the words could not be ſpoke together. 1 *Roll. Abr.* 91. *Stile* 310. 1 *Keb.* 523. Afterwards verdict was given for the plaintiff. See *Cro. Eliz.* 105.

So in *caſe* in which the plaintiff declared, that there being a diſcourſe between him and the defendant concerning the buying and ſelling of two oxen, which the defendant then had in his poſſeſſion, that he (the defendant) *then and there falſely and maliciouſly affirmed that theſe oxen were his*, to which he giving credit bought them of the defendant for ſuch a ſum of money, when in truth they were the proper goods of the ſaid J. S.; and that the ſaid J. S. afterwards, &c. lawfully recovered the ſaid oxen from the plaintiff, &c. and it was held after verdict that the action lay on the bare affirmation, without an expreſs warranty; and then objected that it was not ſet forth that he *knew* that they were the oxen of J. S. nor that he did it *deceitfully*. *Carth.* 90. 3 *Mod.* 261. *Comb.* 142. 1 *Shaw.* 68. 10 *Mod.* 142. 12 *Mod.* 245. *Ld. Raym.* 284, 408, 593, 669, 1118, 1120. *Stra.* 414.

N. B. The words *falſely and fraudulently ſold*, &c. after a verdict, import that it was *knowingly*, and ſupply the want of it. *Stile* 310. 3 *Keb.* 807. *vide* 1 *Keb.* 309. So, the word *knowingly*, &c. implies that it was *fraudulently*, &c. 1 *Sid.* 146. So where the plaintiff declares, that *improvide & incaute, abſque conſideratione inaptitudinis loci*, he drove

his horſes over the plaintiff, though it be not ſaid that he knew they were unruly. 2 *Lev.* 172.

So in the caſe of Medina and Stoughton, 1 *Salk.* 210. the plaintiff declared that the defendant being poſſeſſed of a certain lottery-ticket, ſold it to him, affirming it to be his own, whereas in truth it was not his; defendant pleaded he bought it *bona fide*, and ſo ſold it; the plaintiff demurred, and by Holt Chief Juſtice it was held, 1. That where one having the poſſeſſion of any perſon's chattel ſells it, the bare affirming it to be his amounts to a warranty, and an action lies on the affirmation; for his having poſſeſſion is a colour of title, and perhaps no other title can be made out; but it is otherwiſe where the ſeller is out of poſſeſſion; for in ſuch caſe there may be room to queſtion the ſeller's title, and the buyer muſt take care in ſuch caſe to have either an *expreſs warranty*, or a good title. So it is in the caſe of lands, whether the ſeller be in or out of poſſeſſion; for he cannot have them without a title, and the buyer is at his peril to ſee it. 3 *Mod.* 261. See *Stile* 343, 346. *Cro. Jac.* 197.

If the plaintiff declares, that whereas Queen Elizabeth was ſeiſed in fee of the advowſon of the vicarage of S. whereto the tithes in S. did belong, and that the defendant, upon the 9th of June, did affirm himſelf to be lawful incumbent thereof, and that he had right to the tithes from the death of J. N.; and after, upon the 16th of June, the plaintiff having a communication with the defendant about his buying of the defendant the ſaid tithes 'till Michaelmas following, the defendant *then knowing* that he had no right thereto (the defendant not having been inſtituted, &c.) yet *falſely and deceitfully* ſold them to the plaintiff for 30l. and alledges in fact that J. N. was after preſented, &c. and took the tithes, &c. the action does not lie; for there was no warranty that the plaintiff ſhould enjoy them; and this affirmation alſo was in time precedent to the ſale. *Cro. Jac.* 196. *Moor* 467.

So if there be a communication between A. and B. for the purchaſe of a certain term for years, which B. then had in certain lands, and B. aſſerts that it was worth 150l. to be ſold; to which A. *giving credit* gives him that ſum for it, and afterwards A. could not get ſo much for the ſame, the action does not lie; for here was only a naked affirmation of the defendant that the term was worth ſo much,

much, and it was the plaintiff's folly to believe him. *Yelv.* 20.

But if on a treaty for the purchaſe of a houſe the defendant affirms the rent to be 30l. per annum, whereas it is but 20l. whereby the plaintiff is induced to give ſo much more money than the houſe is worth, the action lies; for the rent being a private matter that lies in the private knowledge of the landlord and the tenant, if it be affirmed that the rent is more than it is the purchaſer is cheated, and ought to have his remedy. 1 *Salk.* 211. 1 *Lev.* 102. 1 *Sid.* 146. 1 *Keb.* 510, 518, 522. Yet if A. poſſeſſed of a term of years, offers to ſell it to B. and ſays that a ſtranger would have given 20l. for this term, by which means B. buys it, though in truth A. was never offered 20l. no action on the caſe lies, though B. is thereby deceived in the value. 1 *Roll. Abr.* 101. 1 *Sid.* 146. See CASE, ASSUMPSIT, CHEAT, and GAMING.

SATISFACTION. See ACCEPTANCE and ACCORD.

SCANDALUM MAGNATUM. Scandalum magnatum is the ſlander of a peer of the realm, or other great officer of the government; or it is an action brought by a nobleman *qui tam* upon the ſtatute 12 *R.* 2. *c.* 11. in the name of the king and the party, the king being concerned in the credit of great men who act by his authority.

The ſtatute of *ſcandalum magnatum* is a general law; and words ſpoken againſt noblemen ſhall be taken in the worſt ſenſe, to preſerve the honour of great perſons. For a man to ſay that *he hath heard, or doth not know but my Lord ſuch-a-one did ſo and ſo, or cannot imagine who did it but he*, being a charge of what is ill, has been adjudged actionable. As alſo for ſaying of a great perſon *he is a wicked, unworthy perſon*, &c. and a great damage recovered on them. But a defendant may juſtify in *ſcandalum magnatum*, ſetting forth the ſpecial matter. And if a charge be falſe, which is alledged in a court, no action lieth. 4 *Rep.* 13. 1 *Ventr.* 60. 1 *Lev.* 277. *Moor* 142. 1 *Ventr.* 59. 2 *Sid.* 21. 1 *Mod.* 232. 4 *Rep.* 13. 2 *Inſt.* 228. 1 *Roll. Abr.* 34. *Cro. Car.* 135.

By ſtatute, none are to report any falſe or ſlanderous news, or tales of great men; whereby diſcord may ariſe between the king and his people, on pain of impriſonment, and none ſhall deviſe or tell any falſe news, lies, &c. of any lord, prelate, officer of the government, judge, &c. whereby any

ſlander ſhall ariſe, or miſchief come to the realm, on pain of being impriſoned. And when any one hath told falſe news, or lies, and cannot produce the author, he ſhall be impriſoned, and puniſhed by the king's council. *Weſtm.* 1. *c.* 34. 2 *R.* 2. *c.* 5. 12 *R.* 2. *c.* 11.

The plaintiff recovers damages by ſtatute for the wrong on action of *ſcandalum magnatum*, and the plaintiff is impriſoned on the ſtatute of Weſtminſter on the king's account.

SCHOOL. No action on the caſe lies where there is damage only without injury; as, if I retain a maſter in my houſe to inſtruct my children; for though this be to the *damage* of the common maſter, yet on my part I have not committed an injurious act, and therefore no action lies. Or, if one ſet up a ſchool in the ſame place where an antient ſchool has been time out of mind, &c. by which the antient ſchool receives damage, yet no action lies. 1 *Roll. Abr.* 107.

SCOLD. See COMMON SCOLD.

SEAL. If A. B. who has a deed belonging to C. D. in his power, tears off the ſeal, an action of treſpaſs lies. *Bro. Treſp. pl.* 29.

SEARCH. If a conſtable, having the warrant of a Juſtice of Peace to ſearch the houſe of J. S. for ſtolen goods, pull down the clothes of a bed in which there is a woman, and attempt to ſearch under her ſhift, this is an abuſe of his authority, and makes him a treſpaſſer from the beginning, and liable to an action of treſpaſs *vi & armis*. *Clayt.* 44. See HOUSE.

SELF-DEFENCE. See HOMICIDE, MANSLAUGHTER, MURDER, and NECESSITY.

SERVANTS. An action on the caſe lies againſt a ſervant for leaving his ſervice before the time contracted for be expired, and alſo againſt a maſter who without juſt cauſe turns his ſervant away before his time be expired.

If one retains a ſervant generally, without expreſſing for any time, the law conſtrues it to be a year, according to the ſtatute; and if a ſervant retained for a year falls ſick, &c. the maſter cannot put away his ſervant, or abate his wages. If a ſervant refuſes to do his buſineſs it is in law a departure from his ſervice, although he continues with his maſter. If a man retain a ſervant for ſo much wages, if he departs within the year he can have no wages: but when a maſter is dead the ſervant is legally diſcharged. And it is a reaſonable cauſe of departure from ſervice, if the ſervant is not

not allowed ſufficient meat, drink, &c. or the maſter's wife beats him. If any perſon entices away a ſervant, or hires him knowing him to be a ſervant to another, the maſter may have action on the caſe againſt him. 1 *Inſt.* 42. *Noy Max.* 90, 91. *F. N. B.* 168. 2 *Lev.* 63.

A man is anſwerable for the actions and treſpaſſes of his ſervant in many caſes; but not in criminal caſes, nor for battery, &c, except done by his commandment. If a man has a ſervant, known to be ſuch, and he ſend him to fairs and markets to buy or ſell, his maſter ſhall be charged. But if a ſervant makes a contract in his maſter's name, the contract will not be binding, unleſs it were by the maſter's commandment or aſſent; and where a ſervant borrows money in his maſter's name without order, that does not bind the maſter. If a ſervant buys things in his own name the maſter ſhall not be charged, except the things bought come to his uſe, and he have notice of it. Where a maſter always gives his ſervant money, he ſhall not anſwer for what he buys on truſt; but if he ſends him ſometimes on truſt he muſt anſwer. *Noy Max.* 99. *Dr. & Stud. Dial.* 2. *ch.* 42.

A maſter is alſo to anſwer for the negligence of his ſervant. If a ſurgeon undertake the cure of a perſon, and by ſending medicines by his ſervant the wound is hurt and made worſe, the patient ſhall have action againſt the maſter, not againſt the ſervant. Where a Smith's ſervant pricks a horſe while he is ſhoeing him, the maſter ſhall anſwer the damage. If a ſervant caſts any thing into the highway to the nuſance of the king's ſubjects, the maſter ſhall be charged. And where a carrier's ſervant loſes goods delivered to him, the maſter muſt anſwer it, and an action lies againſt him. 18 *H.* 8. *Noy Max.* 94.

In other caſes a maſter may maintain the cauſe of his ſervant againſt others. He may bring an action of treſpaſs for battery to his ſervant, when he thereby loſes his ſervice. If a ſervant is cozened of his maſter's money, the maſter may bring action of the caſe againſt the perſon that cozened him. And if a ſervant gives away his maſter's goods, the maſter may have an action againſt the receiver. Servants imbezzeling or purloining their maſter's goods, to the value of 40s. is felony. But if a ſervant, &c. be robbed, without his negligence or default, he ſhall be allowed it on his account. 9 *Rep.* 113. 10 *Rep.* 130. 1 *Roll. Abr.* 98. *Noy Max.* 94. 5 *Rep.* 14. 12 *Ann. c.* 7. 1 *Inſt.* 89.

There

There are ſeveral ſtatutes relating to ſervants, to compel perſons unmarried to go to ſervice, and puniſh them for aſſaults on their maſters, and other miſbehaviours; and ordaining that none ſhall leave their ſervices, without giving a quarter's warning. The wages of ſervants, labourers, &c. are to be aſſeſſed by juſtices in their Eaſter Seſſions, and none are to give greater wages under penalties. 5 *Eliz. c.* 4. 43 *Eliz. c.* 2. 1 *Jac.* 1. *c.* 6.

But it is held that this ſtatute does not extend to wages of coachmen, footmen, or other ſervants than in huſbandry.

If a retained ſervant, although he was not retained for a whole year, has been beat ſo as to be rendered incapable, or leſs capable, of performing his maſter's buſineſs, the maſter may maintain an action of treſpaſs. *Bro. Act. ſur le Caſe, pl.* 55. *Bro. Lab. pl.* 29. 2 *Roll. Abr.* 552. *N. pl.* 7. *Clayt.* 17.

But if a ſervant who was not retained, and ſerved only during pleaſure, has been beat, the remedy of his maſter for the damages thereby ſuſtained is by an action upon the caſe. *Bro. Trav. pl.* 319. *Clayt.* 133. *Bro. Act. ſur le Caſe, pl.* 55. *Bro. Lab. pl.* 29.

If a retained ſervant is taken out of his ſervice, the maſter may, by an action of treſpaſs, recover a ſatisfaction for the loſs of ſervice by him ſuſtained. *Bro. Lab. pl.* 21. 2 *Roll. Abr.* 556. *Y. pl.* 11.

But if J. S. has procured the ſervant of J. N. who was retained, to leave his maſter's ſervice, an action of treſpaſs does not lie againſt J. S. although he afterwards retains him, but the remedy of J. N. is by an action upon the caſe. *Bro. Act ſur le Caſe, pl.* 38. *Bro. Lab. pl.* 21. 2 *Roll. Abr.* 556. *Y. pl.* 12.

It ſeems probable that if a ſervant had, without the procurement of J. S. left the ſervice of J. N. in which he was retained, and J. S. had afterwards retained him, no action would have lain at the Common Law. *Bro. Lab. pl.* 21.

But an action does at this day lie in ſuch a caſe.

For by the 5 *Eliz. c.* 4. *par.* 11. it is enacted, "That no perſon who ſhall depart out of a ſervice, ſhall be retained in any other ſervice, without ſhewing ſuch teſtimonial as is mentioned in this act, to the chief officer of the town corporate, and in every other town, or place, to the conſtable, curate, churchwarden, or other officer of the ſame, where he

he ſhall be retained to ſerve; and that every perſon retaining a ſervant, who does not ſhew ſuch teſtimonial, ſhall forfeit for every offence five pounds."

If a ſervant, who is impowered to ſell the goods of his maſter, gives and delivers any of theſe to J. N. and J. N. carries them away, an action of treſpaſs does not lie, becauſe as a power to ſell implies a power to transfer the property in theſe goods, the poſſeſſion of J. N. was obtained lawfully. *Bro. Treſp. pl.* 295.

But if a ſervant, who had only the cuſtody of his maſter's goods, gives or ſells, and delivers any of theſe to J. N. and J. N. carries them away, an action of treſpaſs lies, becauſe as this ſervant had no power to transfer the property in theſe goods the poſſeſſion of J. N. was tortiouſly obtained. *Ibid.*

If a ſervant who has been intruſted to ſell the goods which are in his maſter's ſhop, carries any of theſe goods away, an action of treſpaſs lies; for the confidence placed in him extended only to the ſelling of them in the ſhop. 1 *Leon.* 87.

If the goods of his maſter, with which a ſervant has been intruſted, are injured by any mal-feaſance of ſuch ſervant, he is liable to an action. *Bro. Treſp. pl.* 295.

But if by reaſon of any neglect of the ſervant, to whoſe care ſuch goods were committed, they receive any injury, an action of treſpaſs does not lie, but the remedy is by an action on the caſe. 5 *Rep.* 14. 8 *Rep.* 146. *Ld. Raym.* 188.

If a ſervant who has by the command of his maſter lawfully diſtrained a horſe, uſes or kills it, the ſervant only is liable to an action of treſpaſs, becauſe he only is a treſpaſſer *ab initio*. *Bro. Treſp. pl.* 211.

If a man injures another with reſpect to a ſervant, by inticing him away, or if my ſervant departs from my ſervice without cauſe or licence, and J. S. knowing him to be my ſervant, retains and keeps him in his ſervice, an action on the caſe lies. 1 *Leon.* 240. *Noy* 10, 106. *Keilw.* 180. 2 *Lev.* 63.

See BATTERY, BILL of EXCHANGE, CASE, and LARCINY.

SETTLEMENT. See BASTARD.

SHERIFF. If a ſheriff levies money upon a *fieri facias*, the plaintiff may have an action of *indebitatus aſſumpſit* againſt him for ſo much money received to his uſe. *Comb.* 130.

SHERIFFS-FEES. See STATUTES.

SHIP *ſunk*. See NUSANCE.

SHIP

SHIP *in diſtreſs*. See CARRIER.

SHOES. If leather has been made into ſhoes, the ſhoes may be taken by him from whom the leather was illegally taken. *Bro. Treſp. pl.* 23. See MONEY and TIMBER.

SHOP-BOOKS. See ACCOUNT-BOOKS.

SIMILITUDE *of hand-writing*. The mere ſimilitude of hand-writing in two perſons ſhewn to a jury, is no evidence that they were written by the ſame perſon; but the teſtimony of witneſſes, well acquainted with the parties hand-writing, that they believe the paper in queſtion to have been written by him, is evidence to be left to a jury.

SIMONY. Simony is a corrupt contract for a preſentation to a rectory, or any other benefice of the church, for money, gift, reward, &c.

This is an offence by ſtatute which incurs the forfeiture of two year's value of the benefice or dignity, by both the giver and the taker; one moiety to the king, and the other to any one who will ſue for the ſame. And if a parſon, corruptly reſign or exchange a benefice, both the giver and taker ſhall forfeit double the value of the ſum, or reward, &c. given; one moiety to the king, the other to the informer. 2 *Lill.* 5. 19. 1 *Inſt.* 120.

And perſons who ſhall corruptly ordain or licenſe any miniſter, or procure him to be ordained or licenſed, ſhall incur a like forfeiture of 40 l. and the miniſter himſelf of 10 l. beſides an incapacity to hold any church preferment for 7 years. 31 *Eliz. c.* 6.

SLANDER. An action on the caſe for words is uſually denominated an action of *ſlander*, which is the publiſhing words either by word of mouth or writing concerning ſome perſon, which if true would ſubject him to ſome injury in his perſon, or property.—Written ſcandal being the fruit of more deliberate malice, and the foundation of a more permanent injury, is conſidered as an higher degree of ſlander than that by word of mouth, and is held as a public rather than a private offence, and beſides the common action on the caſe for the damage ſuſtained, the party injured may proceed againſt the author by indictment or information, and in this caſe to alledge that the ſubject of the defamation is true, will be no juſtification. See LIBEL.

If the ſcandal be of a ſpiritual nature he may proceed by a ſuit in the ſpiritual court.

In treating upon this action, before we come to the point more immediately in queſtion, it may not be improper to take

take notice of a few general circumſtances neceſſary to be conſidered as a prelude to the general ſubject of conſideration; and the firſt is, that tho' with reſpect to the defamer there ſhould be, and indeed it is no conſcientious juſtification of himſelf that the matter alledged is true, yet that the law having in this particular a reſpect to the weakneſſes and frailties of human nature, admits of this as a juſtification, and allows the defendant to give evidence to that purpoſe upon the trial of the fact.

Again, tho' the general fact is, that this action lies for the publiſhing words, in conſequence of which the party defamed does actually receive damage, yet it is to be obſerved, that it is not always neceſſary to point out and prove the particular damage received. The legal diſtinction is, that where the natural and obvious conſequence of the words is a damage to the perſon of whom they are publiſhed, as the loſs of life, limb, &c. office, truſt, calling, &c. or ſuch as expoſes him to corporeal puniſhment, or as charge him with having a contagious diſtemper; or if the title to an eſtate is brought into queſtion by them; or if they are a diſgrace in a profeſſion, trade, &c. they are not only injurious but actionable *in themſelves*, and no ſpecial damage need be averred; but where this is not the caſe, where they are not actionable in themſelves, but they become ſo by reaſon of the ſpecial damage received from them, the party muſt alledge the ſpecial damage he has received, ſeeing it is the ſole ground of the action.

Slander may be conſidered with reſpect to the matter and manner. 1ſt. As to the matter. Words which are liable to this action are.---Such as if true would endanger a man's LIFE. *Co.* 10, 130. *Co.* 4, 15, 16. *Dyer* 19, 26, 236.---His LIMB or MEMBER.---His LIBERTY. *Co.* 4, 15, 17.---Such as ſcandal a man in his office or place of truſt. *Co.* 4, 16, 19. *Co.* 10. 61.---In his calling or trade. *Co.* 4, 17. 19. *Hob.* 93, 109.---Such as charge a man with a contagious diſeaſe. *Co.* 4, 17. *Hob.* 290.---Such as ſlander a man's title. *Co.* 1, 177. *Co.* 4, 18.---Such as tend to his diſheriſion. *Co.* 4, 17.

2d. As to the manner, it matters not whether the words were publiſhed before his face or behind his back. *Co.* 4, 14. 15. *Hob.* 292.---Nor whether in the 2d or 3d perſon. *Co.* 4, 14, 15, 16. But where it is in the 3d perſon, ſomething ſhould appear to make the perſon certain, or it will not

not lie, and an *innuendo* will not make that certain which was before doubtful. 4 *Co.* 17.---Nor in what language, ſo that the hearers do or may underſtand them. *Hob. pl.* 165, 236. 276, 351, 63. Hence that may be actionable in one county which is not in another.---Nor whether uttered by way of affirmation, hearſay or report. *Paſch.* 15 *Car. Appleton's caſe.*---Nor whether by way of interrogation, if the queſtion imply an affirmative. 1 *Roll. Abr.* 48 *K.*---Nor whether the appearance be in earneſt or in jeſt. Yet ſee 1 *Roll. Abr.* 58.---Nor whether the defamer be ſober or drunk, with wine or paſſion.---Nor whether the words were delivered in one or many ſentences, but it regards the ſubject matter and coherence of the diſcourſe, for *ſenſus verborum ſumendus eſt ex cauſa dicendi. Co.* 4. 16. Alſo they are to be taken as ſpoken *conjunctim et uno habitu. New book of entries p.* 226.---Nor whether ſpoken directly, or indirectly and obliquely.

As it has been already obſerved that ſome words are, and others are not in themſelves actionable, and that thoſe which are not ſo in themſelves, may become actionable in conſequence of ſome ſpecial damage which has ariſen thereby, I ſhall conſider this matter on ſuch a plan as will take in the whole doctrine of the law with reſpect to the matter and manner of actionable words.

I.

Of words which are in themſelves actionable.

1. Such as if true would endanger a man's life.

1. *Treaſon and Rebellion.*

This action lies if one ſays to another, *thou art a rebel, and all that keep thee company are rebels, and thou art not the king's friend. Cro. Eliz.* 638. So for ſaying, *thou art an enemy to the ſtate:* for they are very ſcandalous, if not a charge of treaſon. *Cro. Eliz.* 602. *Charter and Peter.*

Theſe words, *he is a Jacobite, and is for bringing in the Prince of Wales and popery to the deſtroying our nation*, were held to be actionable; becauſe they are a charge of evil principles. *Salk.* 696. *How and Prim.* But in another report of the ſame caſe it is held to be ſo where ſpoken of perſons in office, without any determination, if ſpoken of a private perſon. *Ld. Raym.* 812. The doctrine however in *Salk.* ſeems to be law, for it was held ſince that it lies for the following words when ſpoken of any perſon, which do not appear ſtronger than the former, *he has the pretender's picture in his houſe, and*

and I ſaw him drink his health, and he ſaid he had a right to the crown. 8 *Mod.* 283.

One called another *a rebellious and traiterous knave*, the words being thus joined together, were held actionable. *Cro. Eliz. Johnſon and Tuck*

So are theſe words, *thou art a rebel and no true ſubject. Ibid.*

An action will lie for ſaying *A. has counterfeited money. Thomp.* 54. *and Cro. Eliz. Blake and Stanleys.*

2. *Murder.*

An action lies for ſaying to J. N. *thou haſt killed a man*; for altho' no particular man is named, it is a great ſlander. 1 *Roll. Abr.* 77.

So it does for ſaying *you have killed thy maſter's cook* (meaning J. Y. the ſervant of Mr. D.) *who was murdered*, altho' it is not ſhewn who was the plaintiff's maſter, nor that Mr. D. was maſter to him that was ſlain, for the words in themſelves import a ſlander, and 'till the contrary is ſhewn this ſhall be intended. *Cro. Jac.* 423. *Cooper and Smith.* 1 *Roll. Abr.* 77.

It was heretofore held, that no action would lie for words importing a charge of *murder*, without an averment that the perſon ſaid to be killed was dead; but the latter and better opinion is, that the party ſhall be intended to be dead, 'till the pleadings aver the contrary. *Cro. Jac.* 489. *Sid.* 53. *Cro. Eliz.* 569. 823. And upon a motion in arreſt of judgment, it was ſaid that it is not neceſſary, and that the action lies unleſs it appears upon the record that the party is alive. 1 *Vent.* 117.

It lies for charging one *with concealment of murder. Yelv.* 154. *Het.* 70. *Stile* 392. or with *endeavouring to murder ſuch a one. Finch.* 186. 2 *Bulſt.* 20, 206. *Lane* 98. 1 *Bulſt.* 2, 201. But Q. *Co.* 4. 18. 2 *Bulſt.* 206. *Hob.* 118, 375, 351, 196, 332. *Hetl.* 70. *March of Slander* 2, 6?

One ſaid *Mrs. P. ſent a letter to my maſter, and therein willed him to poiſon his wife*, and adjudged actionable, and judgment affirmed in a writ of error brought. *Cro. Eliz.*

3. *Forgery.*

Words which import the charge of a *forgery*, within the ſtatutes againſt this offence are actionable. 1 *Cro.* 883, 237. 178, *Yelv.* 146. 2 *Cro.* 648. 2 *Bulſt.* 136. *Owen* 47. 1 *Cro.* 553, 4, 607. *Dyer* 285. And as forgery is an offence indictable and puniſhable at common law, it will lie if it be not

ſaid

ſaid that it was a forgery of ſuch a deed, &c. as is within any of the ſtatutes. 1 *Roll. Abr.* 65, 66.

But no action lies for ſaying of J. S. *he hath forged the hand of J. N.* the words being too general; for, unleſs it be ſaid to what deed or inſtrument, it is no offence either by the ſtatute or the common law. 3 *Leon.* 231. 1 *Roll. Abr.* 65. *pl.* 4.

For uſing words that ſound adjectively, as *forging knave*, or the like, it will hardly lie. *Proph.* 177.

Nor for telling one, *he has made a falſe bond or falſe deed*, or where the ſenſe of the words is uncertain. *Hob. pl.* 8, 48.

Nor that *he made falſe writings thereby to get my lands from me*; for it is no expreſs averment he had forged writings. *Cro. Eliz. Parkinſon and Bowman.*

4. *Theft.*

This action lies as well for calling a man a *thief* in general terms, as it does for charging him with being guilty of a particular robbery or larceny. *Cro. Jac.* 114.

It lies for charging a man with *ſacrilege.* 1 *Cro.* 301. 2 *Cro.* 153, 154.

Or to call one a *pirate*, or a *maintainer or procurer of pirates.* 2 *Cro.* 629. 4 *Co.* 14.

Or to call one *thief*, *robber*, *houſe-robber*, *ſheep-ſtealer*, *horſe-ſtealer*, or to charge one with having done ſuch offences. 1 *Cro.* 329. *Dyer* 112, 126. *Owen.* 33, 47. 3 *Bulſt.* 260, 303. *Noy* 10, 20.

So for calling one *Welch thief*, or a *roguiſh knave and thief*, or a *cunning thief.* 1 *Cro.* 329. 2 *Bulſt.* 134. 1 *Bulſt.* 146, 220. But where the words are adjective, as *roguiſh thieviſh knave*, *thieviſh whore*, &c. it will hardly lie. *Co.* 4, 16, 19. 1 *Bulſt.* 134, 138. 2 *Cro* 514.

But it is ſaid not to lie where the words do not import a certain charge of felony, as the words, *thou art a falſe knave, thou waſt arraigned for two bullocks*, were adjudged not actionable becauſe he may be arraigned and yet no felon. *Cro. Eliz. Baily and Chinington. March* 91. 1 *Cro.* 459. 1 *Bulſt.* 112. *Hob. pl.* 268. 2 *Cro.* 315.

To ſay *W. you never thought well of me ſince G. did ſteal my lamb*, adjudged actionable, tho' no direct aſſurance that G. did ſteal them. *Cro. Eliz.*

One ſaid *S. did ſteal his mare, or elſe G. was forſworn.* and the words were adjudged not actionable, being no direct ſlander. *Cro. Jac. Sparham and Pye.*

It

It was alſo held that to ſay generally, *you cut my purſe, or took my money out of my pocket*, was not actionable, becauſe it did not neceſſarily imply a felonious taking, ſeeing it might have been a treſpaſs only, but it has been ſince held that an action will lie for the words *I charge J. S. with felony in taking my money out of my pocket*; becauſe it ſhall be intended a felonious taking. *Ld. Raym.* 959. And ſee *Cro. Jac. Lewis and Cawardley, and Holland and Stoner.*

5. *Witchcraft.*

Under the ſtat. 1 *Ja. c.* 11. it was actionable to charge a perſon with *witchcraft, ſorcery, &c.* but ſince the repeal of that ſtatute it is not; for it is expreſsly declared by the repealing ſtatute that no ſuit ſhall be commenced againſt any perſon for the charging another with any of theſe offences.

6. *Rape.*

To charge a man with this offence, or to uſe words which neceſſarily imply it, may be actionable, as to ſay *he ſhould have been hanged for a rape, and it coſt him dear:* or *thou didſt raviſh J. S.* or *he is guilty of raviſhing J. S.* 1 *Cro.* 589, 101. *Godb.* 287.

7. *Sodomy and Beſtiality.*

To charge a perſon with *ſodomy* is actionable. 12 *Co.* 37. See 2 *Bro.* 21. defendant ſaid to the plaintiff, *I know myſelf and I know you, I never buggered a mare*; the court was of opinion that an action did lie, or elſe there might be ſly ways to defame a man and avoid an action. 1 *Vent.* 276. 2 *Lev.* 150.

8. *Anſony or Houſe Burning.*

It is actionable to ſay of J. S. *he did burn a barn with corn in it*, or, *thou didſt burn a dwelling-houſe*, the burning of ſuch barn being felony; but it is ſaid not to be actionable to ſay, *thou didſt burn a barn*, generally; nor may the plaintiff inforce it in the declaration, by ſaying he meant a barn full of corn. *Hob.* 196, 332, 350. 4 *Co.* 14, 20. 1 *Bulſt.* 112. *Yelv.* 21. See *Noys Rep.* 155. *Hut.* 122. 3 *Bulſt.* 267. *Cro.* 834. But here the plaintiff ſhews that the defendant's barn was full of corn, and felonioufly burnt, and that the defendant ſpoke the words of the plaintiff, &c. See *Cook's Ent.* 25.

9. *Popery.*

An action was ſaid to lie, for ſaying theſe words of J. N. *he harboured his ſon knowing him to be a ſeminary prieſt.* See the 27 *Eliz.* and *Cro. Ja.* 300.

II.

Such as if true would endanger a man's limb or member.

1. *Perjury.*

1. It will lie altho' not within the words of the ſtatute againſt perjury.

Altho' ſpiritual courts are not mentioned in the 5th of *Elizabeth* againſt perjury, yet the court held that the following words are actionable, *thou haſt taken a falſe oath in the conſiſtory court at Exeter. Cro. Eliz. Place and How.* But not for ſaying, *thou haſt perjuredly preſented me, &c.* becauſe the words are ſpoken adjectively. *Cro. Eliz.* 204.

So an action lies for ſaying of J. S. *he was forſworn before a juſtice of peace*, for this if not within the words, is within the proviſion or intention of the ſtatute. 3 *Lev.* 166.

Or for ſaying J. S. *deſerved to have his ears nailed to the pillory. Cro. Eliz. Jenkinſon and Mayne*

An action will alſo lie for words that import a charge of perjury, altho' it be not a perjury within the ſtatute; for perjury always was and ſtill is an offence indictable and puniſhable at the common law. 1 *Roll. Abr.* 39. 3 *Inſt.* 164.

It has been held that no action lies for ſaying ſuch a one is *forſworn*, unleſs it be added that it was in ſome judicial proceeding; but that it does for ſaying he is *perjured*; for in this caſe it ſhall be intended to have reference to a judicial proceeding. 4 *Co.* 15. 2 *Bulſtr.* 150. 3 *Inſt.* 166.

Nor does it lie for ſaying *J. S. was forſworn in Leake court*, without ſhewing that this is ſuch a court as could lawfully adminiſter an oath.

One for ſaying, *thou waſt forſworn before the Biſhop of Norwich*, becauſe it does not appear that it is meant before him in his court, nor ſhall they be ſo conſtrued without they have an apparent reference thereto. 1 *Roll. Abr.* 69. But it has been held that for ſaying, *thou haſt procured one Smith to come* 30 *miles to commit perjury before my lord of Wincheſter, and haſt given him* 10 *l. for that purpoſe*, an action lies; for tho' he doth not charge him with committing perjury, nor that the Biſhop of Wincheſter was a perſon before whom perjury could be committed, yet as they were words of great imputation, they ſhall be taken in the worſt ſenſe. *Cro. Ja.* 158.

For ſaying *A. B. has delivered falſe evidence and untruths in his anſwers to a bill of J. S. in chancery*, an action does not lie; for, as many circumſtances in a bill in Chancery are

are not material to the point in queſtion, it is no perjury if ſuch are not truly anſwered. 1 *Roll. Abr.* 70. 3 *Inſt.* 167. *Cro. Eliz. Brown and Michale.*

The charge of perjury ſhould be direct; therefore to ſay of J. S. that he *is detected of perjury*, is not actionable, for there is no direct charge of perjury committed, and an honeſt man may be detected of a crime altho' he is not convicted. 4 *Co.* 16. *Cro. Car.* 268. but to ſay *he is a perjured beaſt*, is. 2 *Cro.* 613. or, *I will prove him perjured*: for this is as great a ſlander as to ſay directly that *he was perjured*, *Cro. Eliz. Woodroof and Vaughan.*

So it has been ſaid, that an action does not lie for words importing a charge of *ſubornation of perjury*, unleſs it be averred that a perjury was committed; for the hiring a man to commit perjury is no offence, unleſs the perjury be in fact committed. 1 *Roll. Abr.* 51. *Harris and Dixon. Paſc.* 5 *Ja.*

Yet *Cro. Jac.* 158. *Paſc.* 5 *Ja.* it was held that ſuch words as are a great imputation are actionable, tho' it be not alledged that a perjury was committed. And it was adjudged actionable, for ſaying, *thou haſt procured falſe witneſſes to ſwear in ſuch an action. Cro. Eliz.* See *Prowſe and Cary.* And for ſaying, *A. gave B.* 10 *l. for forſwearing himſelf in chancery*, for it ſhall be intended there was a ſubornation of perjury. 1 *Roll. Abr.* 41. *Ewer's caſe. Mich.* 9 *Car.*

And in general it will lie for a direct charge of any crime that may be puniſhed with the loſs of life or limb.

III.

Such as if true would endanger a man's liberty, or ſubject him to corporeal puniſhment.

So to ſay of a woman *ſhe has had a baſtard*, with an averment that it has been chargeable to the pariſh of B. is actionable, becauſe in this caſe ſhe is liable to impriſonment: but it is not to ſay merely that ſhe *has had a baſtard. Salk.* 694, 696. 1 *Rol. Abr.* 37, 38. 18 *Eliz. c.* 3. *Cro. Car.* 436.

Heretofore no action could lie for charging a man with being a receiver of ſtolen goods knowing them to be ſtolen; becauſe ſuch receiver was not an acceſſary, unleſs he alſo aided or comforted the thief. But ſince the *ſtat.* 3 *W. and M. c.* 9. *and* 4 *G. c.* 11. it is clearly actionable for they are declared to be acceſſaries after the fact, and are liable to be tranſported.

And in general to charge a perſon with any crime by rea-

ſon of which (if true) he may be impriſoned, is actionable. 2 *Vent.* 266. *Walden and Mitchell.*

To call a woman a *whore*, or uſing words tantamount to it, as, *ſtrumpet*; or to call a woman's huſband a *cuckold*, which amounts to calling her whore, is actionable in London, becauſe if ſhe were ſo ſhe is liable to be carted. 1 *Roll. Abr.* 36. *Comb.* 138. *Str.* 555. *Str.* 471, *and* 545.

So it is to call a woman *bawd* in London, they being by the cuſtom liable to ſuffer corporeal puniſhment. *Cro. Car.* 229, 261.

And to ſay of a perſon that *he keeps a bawdy-houſe*, is actionable in any place; becauſe it is an offence puniſhable in the temporal courts. 1 *Roll. Abr.* 44. *Cro. Car.* 229, 261.

An action lies for ſaying of a brewer, *his beer is unwholeſome*; for it ſhall be intended to mean ſuch beer as he ſells, and a brewer that ſells unwholeſome beer is puniſhable. 1 *Roll. Abr.* 62.

So it does for ſaying *J. E. did wrap gunpowder in a piece of tow, and laid it to my window, and put fire to it, minding to burn my houſe*, for his good name is thereby impaired. *Cro. Eliz. Edwards' caſe.*

So it is actionable to charge a perſon with being guilty of a crime, of which he has been upon his trial acquitted. *Owen* 150. Or, of a crime of which he has been convicted but pardoned, for the pardon takes away the guilt as well as puniſhment: *Hob.* 81.

An action lies for any words that import the charge of a crime, for which a perſon may be indicted. *Freem.* 46.

So it does for ſaying of J. N. *he is a rogue of record*; for he cannot be a rogue of record unleſs he has been convicted upon record. 1 *Roll. Abr.* 43.

But it does not for calling a man *rogue*, *villain* or *varlet*; for ſuch words are conſidered as words of heat. 4 *Co.* 15. *Str.* 304. but if ſpoken of a juſtice of the peace it is otherwiſe. 8 *Mod.* 270. *Ld. Raym.* 1369.

Nor for calling one *cozening knave*, *ſcurvy fellow*, &c. *Cro. Ja.* 427. 1 *Roll. Abr.* 43.

IV.

Of words which ſlander a man in his office or place of truſt.

In order to ſupport an action on the caſe for words which concern a man's office or place of truſt, they muſt either be ſpoken

ſpoken generally without any direct reference, and ſo may be referred to his office by implication; or, they muſt be ſpoken with direct reference to his office; for wherever words which are not in themſelves actionable, become ſo by being ſpoken of a perſon in office, it muſt appear from the words themſelves, or from the pleadings, that they were ſpoken in a converſation concerning his office; for if the *colloquium* is any other ſubject, they will not be actionable. *Cro. Ja.* 557. *Hetl.* 167. 1 *Lev.* 280. *Ld. Raym.* 1360. *Str.* 618.

And they muſt if ſpoken of a place or office of honor only, import a want of integrity; and if a place of profit, words which import inability are as well actionable as thoſe which import a want of integrity.

And if the words are ambiguous, but there appear ſufficient force in them to induce the hearers to take them in the worſt ſenſe, the court will uſually take them ſo. *Hob. pl.* 35.

1. *Of judicial officers.*

To ſay *my lord chief baron cannot hear of one ear*, *Het.* 167. is actionable; or of a juſtice of the peace, that *he is a half-eared juſtice, he will hear but one ſide. Cro. Car.* 223. or that *he is a common barreter*; tho' it will not lie for perſons not in office. *Hob.* 140. 1 *Roll. Abr.* 59. or, *he is a corrupt man*, 1 *Roll. Abr.* 57. *Cro. Ja.* 65. or, *he is no true ſubject.* 1 *Roll. Abr.* 43. *Cro. Ja.* 202. or, *he is a falſe juſtice. Cro. Car.* 223.

And for ſaying, *I have been before J. J. for juſtice, but did not get any thing but injuſtice*, it was reſolved that the declaration being that the defendant intended to ſcandalize him in his place, and cauſe him to be removed, it ſhall be intended that they were ſo ſpoken. *Cro. Car.* 14. Or, *he did for malice prevent the law to ſerve his own turn. Cro. Ja.* 240. Or, *he is a debauched man, and not fit to be a juſtice of the peace.* 1 *Roll. Abr.* 48. Or, *he hideth felonies, and is not worthy to be a juſtice of the peace.* 4 *Rep.* 16. *Cro. Ja.* 167. Or, *that he is a forſworn juſtice.* 1 *Leo.* 280.

But no action lies for ſaying of a juſtice of peace, *he is an aſs, a fool, a coxcomb*, or *a beetle headed juſtice*; becauſe the words import only want of ability, or that *he is a blood-ſucker*, for that it cannot be intended from the words what blood is meant. *Salk.* 695, 698. *Cro. Eliz.* 306. *Sed Q?*

To ſay of a judge of the admiralty, who had pronounced a ſentence, *that he had given the ſentence corruptly*, is actionable, altho' there be no averment that the *colloquium* was concerning his office, for this appears upon the face of the words. *Cro. Ja.* 205.

Wherever an action will lie for words ſpoken of a juſtice of the peace which relate to his office, if they are ſpoken while he is in the actual adminiſtration of juſtice, the ſpeaker may be proceeded againſt by indictment or information; and in ſome ſuch caſes words are indictable, tho' this action will not lie. *New Abr.* 490. *Str.* 420, 1158. *Comb.* 46, 65, 66.

2. *Of other officers*

To call a perſon in office *a common barreter*, is actionable, *Hob.* 140. 1 *Roll. Abr.* 59. Or, *he is a corrupt man*. 1 *Roll. Abr.* 57 *Cro. Ja.* 65.

So, to ſay of a commiſſioner for examining witneſſes in a court of equity, *he hath taken bribes to favour one of the parties*, or *he hath altered the depoſitions that were taken*. 1 *Roll. Abr.* 56, 57.

Alſo, if it be ſaid of a churchwarden, *he hath cheated the pariſh*; for theſe words are a diſgrace in an office of truſt. 1 *Roll. Abr.* 58. *Cro. Eliz.* 358.

So, to ſay of a ſteward of a court, *he hath wronged me in his court, and hath not performed his office according to law*, is actionable; for it is a charge of great miſbehaviour in his office. 1 *Roll. Abr.* 56.

The words *cozening knave*, are not in themſelves actionable: yet if they be ſaid of a bailiff, or any ſervant who is to account for money received, *he is a cozening knave to Mr. A.* (the perſon who employs him) it is actionable. *Cro. Car.* 480.

V.

Words which ſlander a man in his profeſſion or trade.

It is a common rule, that words which are not in themſelves actionable, may become ſo when they tend to diſgrace a perſon in his lawful calling; and as in the laſt caſe, ſo in this it muſt appear upon the face either of the words or pleadings, that they were ſpoken in a *colloquium* concerning ſuch profeſſion or trade. 2 *Saund.* 307. *Str.* 696, 1169. *Cro. Jac.* 557. *Salk.* 694.

Words ſpoken concerning a perſon's trade or profeſſion muſt be ſpoken either generally, and ſo may be referred to

it; or relatively, as to call him *bankrupt*, or the like; or, they muſt be ſpoken with expreſs reference to it.

An action lies for the word *cheat*, if ſpoken of a tradeſman in a converſation concerning his trade. *Salk.* 694. *Ld. Raym.* 1417. 1 *Lev.* 115, 250. 2 *Lev.* 62. 2 *Saund.* 307. *Str.* 696, 1169. But if it be ſaid of J. S. *he cheated J. N. in the ſale of barley*, an action will not lie without it be alledged that J. S. gained his living by buying and ſelling barley; for if he did not he is not injured in his trade. 1 *Roll. Abr.* 62. *Cro. Eliz.* 171.

And it has been held that to ſay of a blackſmith, *he cozened J. S. of a noble in a tire of wheels*, is not actionable; for it might be intended (and the words themſelves import as much) that he had cozened him in the price only, and not in the manufacture of the tire; and for ſaying of ſuch tradeſmen who ſells things, that he cozens in the price is no ſlander, for every man cozens in the price where he ſells for more than it is worth, and it is not here ſaid that the ſmith made this tire of wheels, and if he did not make it, it is no diſgrace to his trade. 1 *Roll. Abr.* 55, 62.

An action was brought by a carpenter for theſe words, *he has charged J. S. for* 40 *days work, and received the money for the work that might have been done in* 10 *days, and he is a rogue for his pains*; but after a verdict for the plaintiff judgment was arreſted. *Str.* 797.

An action lies for ſaying of J. N. a goldſmith, *he ſold a copper chain for a gold one*; becauſe this is a fraud in the uſual courſe of his dealing. 1 *Roll. Abr.* 62. but in *Cro. Eliz.* 83. it was held that in ſuch a caſe an action would not lie unleſs it be alledged that he was a goldſmith, and got his living by buying and ſelling chains.

An action lies for ſaying of a leather-ſeller, *he hath cozened you, he ſold you lamb-ſkins for ſhamois-ſkins; do not you go to him, he will cozen you.* 1 *Roll. Abr.* 63.

VI.

Words which tend to a ſeparation from company.

An action on the caſe lies for all ſuch words as if true would cauſe a ſeparation from the company and ſociety of mankind, as with having an infectious diſeaſe, as the French pox, leproſy, plague, &c. for the miſchief ariſing from ſuch a charge is apparent, and tends to preventing him from obtaining that help and comfort which he is conſtantly in need of from his fellow creatures.

The law makes no diſtinction as to the manner by which the diſtemper ariſes, whether to the viſitation of God, accident, or the indiſcretion of the party infected; for the loſs of human fellowſhip, from whence the legal idea of damage ariſes, is the conſequence in each.

VII.

Such as ſlander a title.

Words which tend to prevent the ſale of an eſtate by the title to it being brought into queſtion, are in themſelves actionable.

If one is poſſeſſed of an eſtate, an action lies for ſaying *he has no right to it.* 4 *Co.* 18.

No action lies for words whereby a title to land is ſlandered, provided the ſpeaker, at the ſame time ſays, that he has himſelf a right to ſuch land; for this would tend to prevent a man's claiming his right, and no one would be ſafe who ſhould claim an eſtate in the poſſeſſion of another. 4 *Co.* 17. *a.* 18. *b.* Yet if it be aſſerted that a third perſon has ſuch a right, it is actionable; but not without ſome ſpecial damage is received. *Cro. Ja.* 164. *Cro. Eliz.* 197.

VIII.

Such as tend to diſinheritance.

Words which tend to diſinheritance are in themſelves actionable.

To call one *baſtard*, is not in itſelf actionable, yet if it be ſpoken of one who is heir apparent to a real eſtate, it is; for it may be the occaſion of his being diſinherited. *Cro. Car.* 469. 1 *Roll. Abr.* 38. Or, if ſpoken to one in poſſeſſion of lands by deſcent. 1 *Roll, Abr.* 37.

So an action lies for calling a reputed ſon of one poſſeſſed of an eſtate in tail a *baſtard*, if ſuch ſon be offered money, for his poſſibility on account thereof loſes the bargain; for tho' the poſſibility of his inheriting is very remote, yet having a preſent damage by ſpeaking the words they are actionable. *Cro. Jac.* 213.

I. *Of words which are not in* THEMSELVES *actionable, but become ſo by reaſon of the ſpecial damage received from them.*

1. Such as tend to the loſs of preferment.

It is not actionable to ſay of every perſon, *he is an heretic*, or *he is excommunicated*; but ſuch words ſpoken of a divine, if it be averred that by reaſon thereof he loſt a certain benefice to which he was about to be preſented, are actionable. 4 *Co.* 17. *a.*

No

No action lies for ſaying of a ſingle woman *J. S. did get her with child*, or, *ſhe had a child by J. S.* for this is only a charge of incontinence, and is a mere ſpiritual defamation; but if it be alledged that ſhe by reaſon of the ſpeaking theſe words loſt her marriage, it does. 4 *Co.* 17. *Cro. Eliz.* 787. *Cro. Ja.* 162.

An action was brought for ſaying of a ſingle woman, *ſhe was with child by J. S.* and it was alledged that by reaſon of it ſhe incurred the diſpleaſure of her parents, and was in danger of being turned out of doors, in this caſe it was held that as there was no loſs of marriage no action would lie. 1 *Lev.* 261.

However, in an action for theſe words, *ſhe is with child, and hath taken phyſic for it*, alledging that by reaſon of them ſhe loſt her reputation and the friendſhip of her neighbours, it was held, that altho' it is not alledged that ſhe loſt her marriage by it, an action will lie. 1 *Roll. Abr.* 35.

An action lies for ſaying of a woman, *ſhe is a burſten bellied queen, and her guts hang down to her garters*; if it be ſhewn that ſhe loſt her marriage thro' them. *Litt. Rep.* 193.

If it be ſaid of J. S. *he is a whoremaſter, for he lay with Brown's wife, and had to do with her againſt a chair*, no action lies; but if it be alledged, that by reaſon of theſe words he loſt a marriage, it does.

II. *Of ſuch as tend to the hurt of trade.*

If one ſay of a brewer, *I will give my mare a peck of malt, and let her drink, and ſhe ſhall piſs as good beer as J. H. brews*; an averment that by reaſon of theſe words, the plaintiff loſt ſome of his cuſtomers, is too general, and he ſhould have ſet out the ſpecial damage. 1 *Roll. Abr.* 58.

1. *Of a divine.*

It is actionable to ſay, *he is a drunkard*, becauſe he is for this offence liable to be deprived. *All.* 63.

Or, *he preacheth nothing but lies and malice in the pulpit.* 3 *Lev.* 17. 1 *Roll. Abr.* 58.

Or, *he is a rogue and a dog, and will never be good 'till he is three foot under ground; I had rather my ſon ſhould make hay on a Sunday, than go to hear him preach. Comb.* 253. Or, *he is an old rogue, and a contemptible fellow, and hated and deſpiſed by every body. Str.* 946.

But for ſaying of a clergyman, *P. is an adulterer, and hath had two children by the wife of J. S. and I will cauſe him to be deprived for it*; it was held that it was a ſlander examinable

in

in the ſpiritual court, and therefore the action would not lie. *Cro. Eliz. Parrat and Carpenter.*

2. *Of a phyſician, ſurgeon or apothecary.*

An action lies for ſaying of a doctor of phyſic, *he is no ſcholar*, and in this caſe it need not be alledged that it was ſaid in a *colloquium* of his profeſſion; becauſe no one can be a good phyſician unleſs he is a ſcholar. 1 *Roll. Abr.* 54. *Cro. Car.* 270.

Or, *that he is a quack ſalver, empiric or mountebank.* 1 *Roll. Abr.* 54.

Or, of a ſurgeon, that *he poiſoned the wound of his patient for gain of money.* 1 *And.* 268. *Caſ.* 277. but it is not actionable to ſay generally, *he poiſoned the wound of J. S.* for it might be proper ſo to do, in order to the cure. *Keely* 175.

3. *Of a counſellor or attorney.*

An action lies for ſaying of a barriſter, *he deceived his client, and revealed the ſecrets of his cauſe.* Or, *he will give you vexatious counſel, and then milk your purſe, and fill his own pocket.* Or, *he is no lawyer, he cannot make a leaſe, they are fools that go to him for law.* Or, *he is a dunce, and will get nothing by his profeſſion.* *Co. Entr.* 22. 1 *Roll. Abr.* 54, 55, 57. 2 *Vent.* 28. *Cro. Car.* 382.

It is alſo actionable to ſay of an attorney, *he is an extortioner, and one told me he cozened him of* 10*l. in a bill of coſts*; for it is contrary to his oath as an attorney to be guilty of mal-practice. Or, *he ſtirreth up ſuits, and once promiſed me, that if he did not recover in a cauſe for me, he would take no charges of me,* becauſe ſtirring up ſuits is a badge of barretry, and to undertake a ſuit no purchaſe no pay, is unlawful maintenance. Or, *he is a rogue for taking your money and has done nothing for it, he is no attorney at law, and dares not appear before a judge, what ſignifies going to him, he is only an attorney's clerk, and a rogue, he is is no attorney.* 1 *Roll. Abr.* 54, 55. *Hob.* 117. *Str.* 1138.

But it does not lie for ſaying, *he is a common maintainer of ſuits*; for to maintain his clients cauſe is his duty. Nor, *that he made falſe writings*, for it is no ſlander to him, ſeeing it is not his buſineſs to make writings. *Hob.* 117. 1 *Roll. Abr.* 55. *Win.* 40, 90. *Sed Q?*

It is alſo actionable to ſay, *he cannot read a declaration.** Or,

* The plaintiff declared that he was an attorney, and the defendant to ſcandalize him in his profeſſion ſaid of him, *that he could not read a declaration*; by reaſon

Or, *he hath no more law than a goose.* Or, *he will overthrow his client's cauſe.* Or, *he is a cheat,* Or *a rogue,* Or *he is a common barriſter,* Or *he is a knave,* Or *he is well known to be a corrupt man, and to deal corruptly.* 1 *Lev.* 297. *Sid.* 327. *Cro. Car.* 589. 4 *Co.* 16. *Hetl.* 167. 1 *Roll. Abr.* 52, 53. *Cro. Eliz.* 171, *Hob.* 14. 1 *Freem.* 277.

4. *Of other artiſts.*

It was adjudged actionable to ſay of a midwife, *many have periſhed for her want of ſkill,* for ſhe may be prejudiced by ſuch words in her function. *Cro. Car.* 211.

So it is to ſay of a ſchoolmaſter, *put not your ſon to him for he will come away as great a dunce as he went. Hetl.* 71.

So to ſay of a land-ſurveyor, *he is a cheating knave,* for this buſineſs requiring ſkill, ſuch words muſt tend to prevent his being employed. *Cro. Jac.* 504.

5. *Of merchants and tradeſmen.*

An action lies for ſaying of a tradeſman, *have a care of him, do not deal with him, he is a cheat, he has cheated all the farmers at E. and now he is come to cheat at F.* Or, *he is a ſorry pitiful fellow, and compounded his debts,* without an averment that they were ſpoken in a converſation concerning his trade, for this is plain from the words themſelves. 2 *Lev.* 62. *Ld. Raym.* 1480. *Str.* 762.

But it was held not actionable to ſay of a merchant, *doth he owe you any money?* and upon being anſwered he did, he added, *you had beſt call for it, take heed how you truſt him. Cro. Eliz. Vanſpike and Gloyſon.*

An action lies for ſaying of a tradeſman, who gets his living by buying and ſelling, *he is a bankrupt.*

An action alſo lies for ſaying of a tradeſman, *he is not a man to be truſted*; or, *he is not able to pay his debts.* 1 *Roll. Abr.* 59. 60. *Comb.* 292. *Cro. Ca.* 3390.

I. *Of certain circumſtances neceſſary to be attended to with reſpect to words in themſelves actionable.*

1. *Of the time when ſpoken.*

It is declared by the ſtatute of limitations, that all actions upon the caſe for words, ſhall be brought within two years

reaſon of which many of his clients left him, and the opinion of the court inclined againſt the plaintiff, for the allegation of ſpecial damages will not maintain the action, unleſs the words import ſome *ſlander,* which theſe did not, unleſs brought in by ſome words precedent, touching his knowledge in his profeſſion; for the declaration might be ſo written, that he might not be able to read it without any imputation of ignorance. 1 *Vent.* 98.

after

after the publiſhing them; but it has been held that in ſome caſes of *ſlander* this ſtatute is no bar; for it hath been holden, that it extends not to an action of *ſcandalum magnatum*. *Lit. Rep.* 342. 3 *Keb.* 645. Nor to ſlander of title, for that is not properly ſlander, but a cauſe of damage, and the ſlander intended by the ſtatute is to the perſon. *Cro. Car.* 141. *Ley.* 82. *Palm.* 530. 1 *Jon.* 196. *S. C.* adjudged that if the words are of themſelves actionable, without the neceſſity of alledging ſpecial damages, altho' a loſs enſues yet in this caſe, the ſtatute of limitations is a good bar; but if the words at the time of the ſpeaking them are not actionable but a ſubſequent loſs enſues, which entitles the plaintiff to his action, the ſtatute is no bar. 1 *Sid.* 95. *Raym.* 61. *S. C.* and ſee 3 *Mod.* 111. *S. C.* cited. 1 *Salk.* 206. *Cro. Car.* 163. And if an action for words be founded upon an indictment, or other matter of record, it is not within the ſtatute, but ſuch action may be brought at any time. 1 *Sid.* 95. *New Abr.* 507.

Tho' there are no expreſs rules as to the difference that the time in which words are ſpoken, can make in the ſenſe of ſuch words, yet it is ſufficiently clear that this is very neceſſary to be attended to. The vulgar ſenſe and uſage of words may be very different in the preſent age to what they were in the laſt, and conſequently that may be actionable now which would not have been ſo then, and *vice verſa:* and men might have been amenable for words then which may be now uſed with impunity, and indeed without ſlander. And not only may time make this difference in the uſe of language, but new acts of the legiſlature may enlarge, diminiſh, or extirpate the idea of crimes ſo far as very much to alter the legal conſtruction of ſcandalous and defamatory words. So that it follows, that all actions for words ſpoken depend greatly on the ſtate of the law at the time they are ſpoken.

Formerly actions for ſlander were very rare and ſeldom made uſe of, unleſs the ſlander were of a very heinous and dangerous nature; but this action very much increaſing with the malice of men, conſtrained the judges to conform to ſome well known maxims.*

In their interpretations of words, and ſo uſually conſidered and interpreted them in *mitiori ſenſu*; but as they found

* *Benignior ſenſus in generalibus et dubiis præferendus, Verba ſunt accipienda in mitiori ſenſu.*

this

this did not at all remedy the growing evil, it was in order to ſtop the progreſs of ſuch actions, declared by the 21 *Ja. c.* 16. that wherever words are in themſelves actionable, the plaintiff, unleſs the jury give him damages to the amount of 40 s. ſhall recover no more coſts than damages. This for a while had the defired effect, and tended very much to leſſen the number of ſuch actions, ſeeing the plaintiff run a riſk which he was not before liable to; and added to this, the judges made it a conſtant rule to bend their force ſo pointedly againſt this action, that the party injured inſtead of obtaining redreſs, frequently had the mortification of paying his own coſts. The judges however perceiving the ill effect of this, and that it ſerved to open the mouth of defamation wider than ever, found it neceſſary to ſtem this torrent of ſlander by an avowed ſupport of the action; and thus it ſtands at this time, and of late it has been the cuſtom to depart very much from (tho' not entirely to abandon) the rule of conſtruing words in *mitiori ſenſu*; in order the more effectually to ſecure public tranquility, and to prevent that abuſe and ſlander which is unfortunately too much in eſteem, and has too many ſupporters.

Thus have the judges in our courts of law, found ſufficient employment to ſteer between two diſagreeable and dangerous rocks——a multiplicity of vexatious actions on the one hand, and the increaſe of ſlander and defamation on the other.

2. *The place where.*

As ſome words have a local ſignification, they may be actionable in one place that would not in another, for the law pays no reſpect to the language uſed, ſo that it be but underſtood.

Thus in the North of England, to call a counſellor a *daffidown-dilly*, is actionable, for there this word ſignifies an *ambidexter*. *Cart.* 214. *Roll. Abr.* 55.

So are the words, *thou haſt ſtrained a mare*, in a county where the words *ſtrained* ſignifies *carnally knew*. *Cro. Eliz.* 250.

So in the Weſtern parts to call a man *a healer of felons*, is actionable, becauſe it ſignifies a *concealer* of felons. *Hob.* 126.

3. *The language they are ſpoken in.*

It is neceſſary that words which are actionable ſhould be underſtood by ſome who hear them; for as it is the ſenſe of

of words that makes them ſlanderous, there can be no ſlander in words which are not underſtood. So that it has been adjudged, if a man ſpeak in Latin certain ſcandalous words of me in the preſence of thoſe who do not underſtand Latin, no action lies, for there is no diſcredit to me; tho' it was averred that the auditors underſtood the *Roman tongue*, for that may be Italian; which is at preſent the Roman language. 1 *Roll. Abr.* 74. *Hob.* 191. However if the meaning of the words is underſtood by the hearer, an action lies, altho' they are ſpoken in a foreign language. *Cro. Eliz.* 496. 855. 1 *Roll. Abr.* 59. *Hob.* 126.

4. *The occaſion of ſpeaking them.*

Particular attention ſhould be paid to the occaſion of ſpeaking words in themſelves actionable, for *ſenſus verborum ſumendus ex cauſa dicendi.* 4 *Co.* 13, 14.

A barriſter in pleading his clients cauſe, may ſay many things with impunity, for which if ſpoken on another occaſion an action would lie; but if he ſaid any thing ſlanderous which was not material to the point in iſſue, he was rendered culpable, and was liable to an action. *Cro. Jac.* 90. *Tr.* 3 *Ja.*

But in the report of the ſame caſe, in 1 *Roll. Abr.* 87. it is ſaid, that where an advocate ſays what is proper for his client in mitigation of damages, it is excuſable, altho' it be not preciſely material to the point in iſſue; and this doctrine is confirmed by *Hughs caſe. Hob.* 328. *Paſch.* 18 *Jac.* And *Style* 42. *Mich.* 7. *Car.* 2. it was laid down, that no action lies againſt a counſellor for ſpeaking ſcandalous words in defending his clients cauſe; for it is his duty to ſpeak for his client, and it ſhall be intended that he ſpoke according to his inſtructions.

If a parſon in preaching recites a ſtory from a book, by reaſon of which ſome perſon is ſlandered, unleſs it appears to be done maliciouſly, no action lies. *Cro. Jac.* 91. 1 *Roll. Abr.* 87.

5. *The deſign of the ſpeaker.*

Words in themſelves actionable, are not ſo when it appears manifeſtly that the ſpeaker had no malicious intention to injure or ſlander the perſon ſpoken of, as if they are ſpoken jocoſely, out of concern, &c. 1 *Lev.* 82. *Rell. Abr.* 58.

6. *Of words ſpoken in a courſe of juſtice.*

Regard ſhould always be had to actionable words which are ſpoken in a courſe of juſtice; for it might impede the diſcovery

covery of the truth, and the regular courſe of judicial proceedings, if men were to fear actions at law for ſpeaking what juſtice requires. It is therefore held, that no action lies for words publiſhed in a court of juſtice, tho' they would be actionable if ſpoken on another occaſion. *Cro. Eliz.* 247.

And indeed no action will lie for a mere ſlanderous fallacy if in a judicial way, except it be accompanied with malice, for then an action upon the caſe in the nature of a writ of conſpiracy lies, and highly reaſonable it is in order to avoid the extremes into which the unreſtrained permiſſion of judicial ſlander (if I may be allowed the phraſe) would run. 1 *Roll. Abr.* 111. 112.

So no action lies for ſlanderous words contained in a bill of indictment, but it does for publiſhing the contents of the bill. 3 *Leon.* 138. 4 *Co.* 14. *Cro. Eliz.* 247. 1 *Saund.* 132.

If one ſays, *I charge you with felony*, an action lies; but if ſo charged before a juſtice of the peace it does not. 1 *Roll. Abr.* 43. *Hob.* 82. *Cro. Eliz.* 248.

An action does not lie againſt a witneſs for ſlander in his evidence, it being in a courſe of juſtice. *Cro. Eliz.* 230. But if a witneſs ſpeaks ſlanderous words which are not material to the point in queſtion, an action will lie. *Cro. Eliz.* 248.

No action lies for a charge in articles of the peace exhibited againſt any perſon, notwithſtanding the charge is falſe, and he is by reaſon of it put to the trouble and expence of entering into a recognizance for keeping the peace. 4 *Co.* 14, 15.

A. libels in the ſpiritual court againſt B. for defamation, and produces C. as a witneſs, and B. makes allegation in writing according to the courſe of that court, that C. who was prejudiced in ſuch a cauſe ought not to be received as a witneſs. Altho' this allegation may be falſe, yet, as the court had juriſdiction in the original matter, C. ſhall not have an action againſt B. for if he might, it would prevent the detection of bad witneſſes. 1 *Roll. Abr.* 33.

And the obſervation in this laſt caſe, that the court had juriſdiction in the original matter, points us to this diſtinction, that if a perſon be charged with a crime in a court that has no juriſdiction in ſuch crimes, it alters the caſe, for that cannot be ſaid to be done in a courſe of judicial proceedings. 4 *Co.* 14. 1 *Roll. Abr.* 34.

7. *Of*

7. *Of words in the paſt or future tenſe.*

Properly words ought to be ſpoken in the preſent tenſe to make them actionable, but this rule ariſes from a ſuppoſition that charges againſt a man *in præſenti* are the moſt likely to injure him, and therefore this ſhould be conſtrued as a requiſite no further than this is the caſe; for where words in the paſt or future tenſe are likely to have the ſame effect, they are equally actionable. 1 *Roll. Abr.* 39, 48, 49. 1189.

8. *How far actionable words muſt be affirmative.*

Though words which are actionable, and which import the charge of any ſlander, ſhould be affirmative, yet they may be either directly or indirectly ſo; for any indirect ſlander which amounts to an affirmative is actionable.

As for ſaying, *I think, or dreamed that J. S. committed a certain felony*; for ſuch a felony having been committed he may be arreſted on ſuſpicion. *Cro. Eliz.* 348.

Or, *if you had had your deſerts you would have been hanged for felony*; for although a condition is annexed they amount to a charge *of felony*. *Brownl.* 3. But if A. ſays of B. *thou deſerveſt to be hanged*, or, *thou haſt done that for which thou deſerveſt to be hanged*, no action lies; for here is not, as in the other caſe, a charge of a particular fact, but only a general declaration of the opinion which A. entertains of B. 1 *Roll. Abr.* 43.

If it be ſaid, *you are as great a rogue as J. S. who ſtole quilts here*, though they are but comparative words they amount to a charge of theft, and are actionable. *Com.* 267. So are the words, *you are as arrant a thief as any in England. Cro. Ja.* 687.

Or, *J. S. ſays I am a perjured rogue; he is perjured as well as I.* 1 *Lev.* 65. Or, *one of us two are perjured, and it is not I.* 1 *Roll. Abr.* 73. Or, *we will have them ſtand in the pillory, and have their ears for perjury.* 1 *Roll. Abr.* 50. Or, *he gave* 10*l. to A. for forſwearing himſelf in Chancery*; for it is tantamount to a charge of ſubornation of perjury. 1 *Roll. Abr.* 41.

9. *How far ſlander may be by implication.*

Words in general ſhould be expreſs; yet there are many caſes where an implied charge will amount to ſlander.

As, if it be ſaid, *I know what I am, and I know what Snelt is, I never buggered a mare*, an action lies, for it is ſo ſtrong an implication as to amount to an expreſs charge.

2 *Lev.*

2 *Lev.* 150. 1 *Vent.* 276. So it does for ſaying, *he was whipped for ſtealing of ſheep.* 1 *Roll. Abr.* 50.

10. *Of the certainty required in actionable words, and how want of certainty may be ſupplied.*

The certainty of words relate to the perſon defamed, and to the ſubject matter of the defamation; for if there is any want of certainty in either of theſe an action cannot be ſupported.

So it has been held that an action will not lie for ſaying of a man, *he is no true ſubject of the king*; for the word *true* is of uncertain ſignification, and may have various latitudes. Or, to call a man *a rebel*; for a commiſſion of rebellion out of the Court of Chancery may have iſſued againſt him. 1 *Roll. Abr.* 69.

So if it be ſaid *one of my brothers is perjured*, no action lies, for it is uncertain which of the brothers is meant. *Cro. Jac.* 107.

But the want of certainty in the words themſelves is frequently ſupplied by the apparent intention or meaning of the ſpeaker, or the circumſtances that attend the ſpeaking of them; or by an averment that the ſpeaker meant ſo, &c. As, if one ſay, *my brother is perjured*, a brother of the ſpeaker may have an action for them, with an averment that they were ſpoke of him, although it be not averred that the ſpeaker had no other brother; for it ſhall not be intended that he had. In this caſe the true diſtinction was taken, viz. that where the words are in themſelves apparently uncertain; as if it had been ſaid, *one of my brothers is perjured*, no averment can cure this; but if, as in the preſent caſe, ſome perſon is intended, it may be aſcertained by averment who this is. *New Abr.* 504. *Cro. Jac.* 107. 1 *Roll. Abr.* 79.

At this day an averment of the words being ſpoke of the plaintiff is ſufficient, without alledging that at the time of ſpeaking them there was a *colloquium* of him. *New Abr.* 504. *Cro. Ja.* 241. 1 *Roll. Abr.* 80. *Cro. Jac.* 673.

11. *Where words uncertain upon the face of them are conſtrued in* mitiori ſenſu, *and where not.*

As many words are in themſelves ſo uncertain as to the ſenſe of them, that they will bear a double ſenſe, and ſo may be conſtrued in ſuch a way as to make them actionable, or not, the law has in general choſe that ſenſe of them which is not actionable.

But though the law has this liberty of choice in its conſtruction of words, and may interpret doubtful words in a mild ſenſe, yet this is now carried no further than as the abſolute neceſſity of the caſe ſhall require it; for as it would be injurious to the ſpeaker to put the worſt ſenſe upon his words, when they are equally, or more capable of a better; ſo it would be oppreſſive to the party defamed, if the words were to be ſubject to a forced and unnatural conſtruction in order to interpret them in too mild a ſenſe. 1 *Roll. Abr.* 71. *Skin.* 364. 10 *Mod.* 196.

Therefore if it be ſaid to a woman, *thou haſt poiſoned thy huſband*, theſe words with an averment that her huſband is dead, are actionable; for tho' it is poſſible ſhe might give him poiſon by miſtake, or that he might not die of it, or that he might live a year and day after it, theſe are forced conſtructions, the obvious import of theſe words being that it was a voluntary poiſoning of which he died. *Cro. Ja.* 438. 1 *Roll. Abr.* 71.

Or for ſaying of a woman, *ſhe is a lewd woman of her body, and has the pox*; for the great pox is plainly intended.

It was formerly held that no action lies for ſaying I charge J. S. with felony, for taking money out of my pocket, becauſe a felonious taking is not *neceſſarily* implied; but in later caſes it has been adjudged otherwiſe. *Hutt.* 38. 2 *Lev.* 51. 2 *Ventr.* 313. *Lord Raym.* 959. 6 *Mod.* 23.

12. *Of participles, and of adjective words.*

In many caſes words which are ſpoken adjectively, and import only the charge of an inclination to do an act, are not actionable in themſelves; but they are where they import an act done, and where they are ſpoken of one in his office or profeſſion.

If one ſays of J. S. a tradeſman, *he is a baſe beggarly bankrupt knave*, an action lies, for it was held to be all one as if he had ſaid, *he is a baſe beggarly knave, and a bankrupt.* And it was held on an action for ſaying of one, *thou art a bankrupt knave*, that the word *bankrupt* is not an adjective, but a ſubſtantive, and the word *knave* another. 1 *Roll. Abr.* 47.

If it be ſaid, *I accuſe J. S. of poiſoning his aunt*, they are actionable, for they imply the act of poiſoning to have been done. 1 *Roll. Abr.* 49. *Sid.* 373. Or, *thou art a buggering rogue, and I could hang thee*, for here the word being an active participle implies an act done. *Sid.* 373.

In

In a very late caſe theſe words, *thou art a pitiful ſheep-ſtealing fellow*, were on a motion in the King's Bench, in arreſt of judgment held to be actionable, becauſe a charge of felony is thereby imported; and *per cur.* the ſame nicety is not as heretofore obſerved in the conſtruing words; for the rule now adhered to by all the courts, is to underſtand them in their uſual and obvious ſenſe. *New Abr.* 507. See PLAINTIFF and DEFENDANT.

13. *Interrogative words.*

If one ſay of another, *when wilt thou bring home the nine ſtolen ſheep, which thou didſt ſteal from J. S.?* an action lies upon theſe words. 1 *Roll. Abr.* 48. *Cro. Jac.* 569.

14. *Conditional words.*

If one ſays, *If J. S. might have his will he would kill the king*, an action lies; for though it refer to his will, yet it is a great offence to have ſuch a will. 1 *Roll. Abr.* 48.

15. *Of conjunctive and disjunctive words, and of ſubſequent words which explain or qualify the former.*

Where words are publiſhed in the disjunctive, and part of them are not actionable in themſelves, no action lies; as if it be ſaid, *thou haſt ſtolen my mare, or didſt conſent to the ſtealing her*, no action lies, becauſe the latter words are not actionable. *Cro. Eliz.* 780. But wherever words in themſelves not actionable are joined to others which are ſo by a copulative, they are actionable; as if it be ſaid, *J. N. did ſteal, and cozened ſeveral quarters of my barley*, they are actionable, notwithſtanding the laſt words alone are not ſo. *Win.* 45. 102.

There has been no little diſſenſions in opinion reſpecting the qualifying the former words by ſubſequent ones, when the words *and* or *for* come between them; as, *thou art a thief*, and *haſt ſtolen my trees*; or, *thou art a thief*, for *thou haſt ſtolen, &c.*; for one holds that the word *and* is a manifeſt addition to the ſlander, which without doubt it is; but another will not allow it to be ſo, in excluſion of the ſame privilege for the word *for*; whereas a third has contended, that the word *for* ſerves ſimply to explain and qualify; and a fourth will inſiſt that they ſhall be conſidered both alike. See *Hob.* 77, 98, 191, 106, 381, 404, 476. 1 *Bulſt.* 143. *Bendl.* 137. *Goldſb.* 335. 4 *Co.* 19. *Yelv.* 10, 34, 154. 155. 2 *Cro.* 39, 114. *Noy* 135. *March.* 211, 280.

But it ſeems to have been generally held, that where the word *and* is uſed an action lies, but not where the word *for*

is; as to ſay, *thou art a thief, and haſt ſtolen my app'es*, was actionable; but not to ſay, *thou art a thief, for thou haſt ſtolen my apples*. *Roll. Abr.* 51, 52.

But it has been the eſtabliſhed method of the courts ſince the caſe of Clerk and Gilbert, *Hob.* 331. that the words *and* and *for*, when thus uſed in the common ſenſe and acceptation of them, mean the ſame thing. *Ld. Raym.* 960. 2 *Salk.* 696. 6 *Mod.* 23. And in that caſe, where the defendant had ſaid, *thou art a thief, and haſt ſtolen* 20 *load of furze*, it was held that no action lay.

Yet it has frequently been the caſe, that where the word *and* is uſed, the ſubſequent words will ſo far explain the preceding ones, that though they would have been actionable if ſpoken of themſelves, yet they will ſhew that the ſpeaker intended no ſuch meaning as thoſe preceding ſeemed to import: As if one ſays, *thou haſt raviſhed a woman, and I will make thee ſtand in a white ſheet*, theſe words are not actionable, for the latter words ſhew that fornication or adultery only, and not a felonious raviſhment, was intended. *Cro. Jac.* 666.

16. *Of words which import an intention only to do an act.*

Words which imply a naked purpoſe or intention are not actionable. 4 *Co.* 16. But words which import not only an intention, but the doing a criminal act, though it is not the principal act intended to be done, are actionable.

So no action lies for ſaying of J. S. *he keepeth men to rob me*, or, *he would have killed me*, theſe being only charges of a mere intention. 1 *Roll. Abr.* 51.

But if an act be imported, as well as an intention, it does: as to ſay, *ſhe would have cut her huſband's throat, and did attempt it*, an action lies. *Ibid.*

Or, *he would have robbed me if J. S. would have conſented to it; and he perſuaded J. S. to go with him, and told him he ſhould have money enough*, for the perſuaſion is an act. 1 *Roll. Abr.* 51, *Cro. Eliz.* 710.

17. *Of repugnant words.*

It was formerly held, that if a feme-covert ſays, *you have ſtolen my goods*, theſe words are not actionable, becauſe they are repugnant, ſhe having no goods of her own to be ſtolen. 1 *Roll. Abr.* 74. But this ſeems at beſt doubtful, for it has been held that theſe words amount in common intendment to a charge of ſtealing the huſband's goods, and it was adjudged

judged an action would lie; and indeed, if the words import a charge of felony, it ſeems immaterial whoſe goods they were. *Cro. Jac.* 600.

If in the plaintiff's declaration it appears that the charge imported to be committed was not done by any body, as if the perſon ſaid to be killed is living, it is ſaid no action lies: 4 *Co.* 16. And it was held upon a writ of error in the Exchequer Chamber, that no action lies for ſaying, *J. N. has killed the ſervant of J. S.* unleſs it be alledged that ſome ſervant of J. S. is dead. *Cro. Ja.* 331. But it is now the eſtabliſhed rule that words importing a charge of having killed any perſon are actionable, without averring that the perſon is dead, unleſs it appears from the words, or the record, that he is not dead. 1 *Vent.* 117. *Cro. Eliz.* 569, 823. *Cro. Ja.* 489. *Sid.* 53.

18. *Of hearſay words.*

It has been held that no action lies for ſpeaking words which the ſpeaker heard another ſay, if the perſon heard to ſpeak them is named, unleſs it had been alledged that that other perſon had not ſpoke ſuch words. 1 *Roll. Abr.* 64.

If A. ſays, that *B. reported that he has had the uſe of the body of C.* no action lies for C. againſt A. without an averment that B. had made no ſuch report. *Cro. Ja.* 162.

So if theſe words are ſpoken by J. S.—*P. did ſay that L. ſaid that there is no Prince in England*, in an action by L. it muſt be averred that P. never ſpake ſuch words. *Cro. Ja.* 406. 1 *Roll. Rep.* 444. 3 *Lev.* 171.

But if one ſay, *thou art a pitiful ſheep-ſtealing fellow, and farmer P. told me ſo*, they are actionable, although it be not alledged that farmer P. did not tell the ſpeaker ſo; and it was adjudged, that as the words importing a charge of felony were actionable, it was not material whether farmer P. told him ſo or not. *New Abr.* 510.

SODOMY. Sodomy is a moſt deteſtable, unnatural and abominable crime, and conſiſts in the carnal knowledge of man or beaſt, againſt the order of nature. It may be committed by man with man, (which is the moſt common crime) or by man with woman; or by man, or woman, with a beaſt: And is moſt juſtly puniſhable with death by the common and ſtatute law, both of which conſider them as unfit for the ſociety of man, whoſe actions demonſtrate that they are worſe than beaſts. Not only he that doth the act is the *principal*, but thoſe that are preſent, aiding and abetting him are prin-

cipals. It is felony in the agent, and patient, unleſs the perſon on whom it is committed be within the age of diſcretion, and then it is felony in the agent only. 3 *Inſt.* 58. 12 *Rep.* 36. *Hal. P. C.* 177. *Dalt.* 382. Some kind of penetration and emiſſion is to be proved.

Peccatum illud horribile, inter chriſtianos non nominandum. 2 *Rep.* 57.

SPOUT. If one man fixes a ſpout for the carrying off water from his houſes, and the water thereby falls and does damage upon the ground of another, an action on the caſe will lie. *Str.* 635. *Ld. Raym.* 1402. And if it be an impediment to the public the party may be indicted.

STABBING. See MURDER.

STALL. An action of treſpaſs lies for erecting a ſtall in a public market; for although a man has of common right a liberty of ſelling in ſuch market, he cannot without the leave of the owner erect a ſtall there. *Str.* 1239.

STATUTE. Where a ſtatute or act of parliament either commands or prohibits the doing certain acts, and annexes a pecuniary penalty upon a breach of this law, and preſcribes no particular method for the recovery of the penalty, the party who is entitled to the penalty is alſo intitled to an action of debt for the recovery of it. *Poph.* 175. This has introduced a common practice of bringing this action upon the ſtat. 2 *Ed.* 6. *c.* 13. which gives the treble value for not ſetting forth tithes. See 1 *Roll. Abr.* 598. A ſheriff is alſo intitled to this action for his fees (given by 28 *Eliz. c.* 4.) upon an execution ſerved by him, altho' the ſtatute does not ſay he ſhall have his fees, nor does give him any action for them; but only ſays, that he ſhall not take, for any execution ſerved, any conſideration or recompence beſides that thereafter in the ſaid act mentioned. 1 *Roll. Abr.* 598, *Latch.* 17, 51. *Noy.* 75. 1 *Salk.* 209.

By the 4*th Geo. 2. c.* 28. Action of debt will lie for double the yearly value of lands, &c. againſt a tenant for life or years, or one in colluſion with him, if he holds over after the determination of his term, and after demand made in writing by the perſon in remainder, or reverſion, for delivering poſſeſſion thereof.

It has been adjudged in the Exchequer concerning the above ſtatute reſpecting tithes, that he that hath the wrong, and not the king, ſhall have the penalty; for it is a general rule that where a ſtatute gives a forfeiture or penalty againſt him

him who wrongfully detains or diſpoſſeſſes another of his duty or intereſt, he that hath the wrong ſhall have the forfeiture or penalty. 1 *Inſt.* 159. 3 *Lev* 290.

As every ſtatute made againſt a grievance, &c. does by implication give a remedy, the party injured may have an action, altho' none is expreſsly given 10 *Inſt.* 55, 74. 10 *Rep.* 75. And where a ſtatute commands or prohibits a thing for the advantage of any perſon, that perſon ſhall have an action upon ſuch ſtatute for an injury done him contrary thereto. 6 *Mod.* 26.

If a penalty or any part of it is given by a ſtatute to him who will ſue for it; any perſon, altho' not injured by the offence, may bring an action or information *qui tam* for it. 2 *And.* 127, 128. 2 *Hawk.* 265.

But where a penalty is given by a ſtatute to be recovered in any court of record, this can only be recovered in the courts at Weſtminſter. *Salk.* 178.

In an action upon a ſtatute giving a PENALTY againſt ſeveral defendants, only one penalty ſhall be recovered. *Cro. Eliz.* 480. But where a ſtatute gives a forfeiture, each defendant muſt pay the FORFEITURE: for the forfeiture is not in the nature of a ſatisfaction to the party injured, but a puniſhment of the offender; and although *debts* are *joint*, *crimes* are *ſeveral*. 1 *Salk*, 182.

When an act of parliament commands or prohibits any thing *generally*, the perſon guilty of diſobedience to it, beſides being anſwerable in an action to the party thereby injured, is alſo liable to be indicted for his contempt of law. *Cro. Eliz.* 655. 2 *Inſt.* 131, 163. 1 *Hawk.* 60. But if the thing commanded or prohibited can only be prejudicial to one or two perſons; as if it be to repair the bank of a river, for want of doing which the ground of a certain perſon is overflowed, no indictment lies; but the remedy is by action on the caſe. 2 *Sid.* 209. So, if a ſtatute extends to all perſons, but chiefly concerns diſputes of a private nature, as thoſe relating to diſtreſſes between landlords and tenants, an offence againſt ſuch ſtatute is not indictable. 1 *Mod.* 71, 288. See INDICTMENT.

STEALING. See HEIRESS, LARCENY, and RESTITUTION.

SUICIDE. Is that ſpecies of cowardice which leads a man to put a period to his vital exiſtence. A learned and ingenious author has in a few words given us the moſt ſtriking character of this crime, "A ſuicide (ſays he) is guilty of a

" double offence; one ſpiritual, in invading the preroga-
" tive of the Almighty, and ruſhing into his preſence un-
" called for; the other temporal, againſt the king, who
" hath an intereſt in the preſervation of all his ſubjects."
Suicides are to be buried in the highway, with a ſtake driven through their bodies, and their goods and chattels are to be forfeited to the king.

SUITS. See BARRATRY and MAINTENANCE.

SURGEON. An action on the caſe lies againſt a ſurgeon who undertakes to cure a wound and neglects it, whereby the perſon becomes incurable.

T.

TALLOW-CHANDLER. See NUSANCE.

TAYLOR. An action lies againſt a taylor who undertakes to make clothes and ſpoils them.

TENDER. Tender is an offer of money, or other thing to ſave the penalty of a bond, or for rent, on contract, &c.

Tender of money on a bond is to be to the perſon of the obligee at the day appointed, to ſave the penalty and forfeiture, and it ought to be done before witneſſes; but if the obligor be afterwards ſued, he muſt ſtill pay it. Where the obligor is to do any collateral thing, as to deliver a horſe, &c. if the obligor offers to do his part, and the obligee refuſeth it, the condition is performed, and the obligation diſcharged for ever. 1 *Inſt.* 207, 208, *&c.*

The executors or adminiſtrators of a mortgagor may tender money due on a mortgage, to prevent the forfeiture of the eſtate mortgaged. A tender of rent muſt be of the whole rent due, without deduction of taxes, &c. unleſs it be ſo agreed, ſtoppage being no payment in law. And it may be on any part of the land, or at any time of the laſt day of payment, which will ſave the condition for that time, altho' the landlord refuſes it. When rent is tendered the leſſor may afterwards bring an action of debt, but he cannot recover any damages. 1 *Inſt.* 202. *Lit. Rep.* 33, 34.

A tender upon the land, before diſtreſs for rent or damage-feaſant, makes the diſtreſs tortious. Tender after the diſtreſs, and before the impounding, makes the detainer, and not the taking, tortious; but a tender after the impounding makes neither the one nor the other tortious.

The

The tenders in this laſt caſe comes too late, as will likewiſe tender of amends in treſpaſs after a ſuit commenced. 8 *Rep.* 147.

Upon tender of money the following points ſhould be obſerved:

1. It ſhould be tendered in lawful Engliſh money, not in foreign money, or Engliſh notes.

2. It ſhould be of the very ſum that is due, neither more nor leſs.

3. It muſt be a real and actual tender, by holding out the hand towards the party, with the money in it, and not in a bag, or the like; and therefore a mere ſaying I will pay you ſo and ſo is no tender.

4. It ſhall be done in the preſence of a witneſs. See ACCEPTANCE.

THEFT. See LARCINY.

THREAT. See MENACE, and SERVANTS.

TIMBER. If a piece of timber which was illegally taken from J. S. has been hewed, if he can identify it, it is lawful for J. S. to retake it. *Bro. Treſp. pl.* 23. But if a piece of timber has been uſed in building or repairing a houſe, this, although it is known to be the ſame cannot be retaken, becauſe its nature is changed, and it is become real property, *Ibid.* See MONEY.

TITHES. If a pariſhioner ſets out his tithes of hay duly, and requires the parſon to carry them off his land, but he does not carry them off in a convenient time, by reaſon of which the graſs where the hay lays is impaired, an action upon the caſe lies againſt the parſon. 1 *Roll. Abr.* 109. *Comyn.* 22, 187, 189. N. B. the parſon, is not obliged to take the tithes of graſs the day it is cut, but may let it lie there long enough to make it into hay. *Stra.* 245.

TOLL. If a man ought to have toll upon the buying of cattle in a market, and one buys cattle without paying the toll, an action on the caſe lies againſt him.

So if perſons coming to market are diſturbed of the toll thereon, yet for the poſſibility of that, and of the loſs, although it does not appear whether they would have been ſold, an action lies. 1 *Vent.* 26, 28. 11 *H.* 4. 47. *b.* 9 *H.* 6. 46.

Or, if upon a ſale in a fair, a ſtranger diſturbs the lord in taking the toll, an action on the caſe lies. 1 *Roll. Abr.* 106. 9 *H.* 6. 45.

If any tenants within a certain lordſhip ought time out of mind to go free to every market and fair, to ſell and buy goods without payment of toll, and one takes toll of my tenants in his fair or market, an action on the caſe lies againſt him. 1 *Roll. Abr.* 107.

TONGUE. See MAYHEM.

TOOTH FORE. See MAYHEM.

TREASON. The judgment in high treaſon is, that the offender ſhall be drawn to the gallows, hanged, cut down alive, and while alive his entrails to be burned, that his head be cut off, and his body quartered, with corruption of blood and forfeiture of lands and goods.

TREASURE TROVE. Where any money, gold, ſilver, or plate, &c. is found hid in the earth, and no man knows to whom it belongs, the property thereof belongs to the king, or to the lord of the manor, by grant or preſcription; but if any one has a property in it, it does not belong to the king, or the lord, but to the owner. Where there is no owner, if any perſon conceal it he is puniſhable by fine and impriſonment. But this extends not to money lying upon the earth, or in the ſea. 3 *Inſt.* 132. 5 *Rep.* 109. *Kitch.* 80.

TRESPASS *vi & armis*. Treſpaſſes are properly divided into two general parts, treſpaſſes *without*, and treſpaſſes *with* FORCE. Of the former we have already treated under the word CASE, and of the latter I ſhall now treat under the title of treſpaſs *vi & armis*.

The word *treſpaſs*, from the Latin *tranſgredior*, ſignifies literally *to ſtep beyond*, and is uſed in the preſent inſtance, becauſe thoſe acts which give riſe to either of the above ſpecies of actions, are a going beyond what ought of right to be done, and are therefore, in general, literally *treſpaſſes*.

The phraſe *vi & armis* ariſes from the words which are uſed in the writ of general treſpaſs; for the wrong is ſuppoſed to be done *vi & armis, & contra pacem*, &c.

It has been held, that a ſatisfaction may in ſome caſes be recovered in an action of treſpaſs *vi & armis*, not only for an injury which has been the immediate conſequence of a treſpaſs with force, but for that alſo which has accidentally followed from that treſpaſs.

It is a neceſſary and indiſpenſable ingredient to the founding of this action, that there ſhould not only be an injury, but that it be done either with actual or implied force; ſo that

that it cannot lie for an injury ſuſtained in conſequence of a nonfeaſance or negligence; for where no act has been done there cannot have been any force; nor can it be had for any ſpecies of mere *fraud*, ſeeing it is eſſential to theſe that they ſhould be unaccompanied by force.

Hence it is apparent that it will not lie for an injury ſuſtained in conſequence of the doing of a lawful act; becauſe the doing of this act cannot come under the legal idea of force, and the proper remedy in theſe caſes is action on the caſe.

So it has been held, that if one man fills up a ditch which has long been a watercourſe, and by reaſon of this the land of another is overflown, the latter may maintain an action of treſpaſs *vi et armis*; but in a more modern caſe it has been held that this action would not lie in ſuch caſe, provided the ditch was in the land of him who filled it up; becauſe it was lawful for him to fill it up; and that if any injurious conſequence has followed from thence to another, the remedy is by an action upon the caſe. *F. N. B.* 89. *Bro. action ſur le caſe, pl.* 46. *Ld. Raym.* 1402. *Str.* 636.

The proper remedy where treſpaſſes accompanied either with actual or implied force have been prejudicial to the *public*, is by indictment or information at the ſuit of the king. And where *actual force* has been committed by which only one or more private perſons have been injured, tho' the injured parties may have ſatisfaction by action of treſpaſs, yet the offender is liable to an indictment or information; for altho' the injury has extended only to a *few* private perſons, yet as there can be no actual force without a breach of the peace, ſo every ſuch breach is conſidered and may be puniſhed as a public offence. See ASSAULT, BATTERY, CATTLE, FALSE IMPRISONMENT, LAND and TROVER.

TROVER. This action has ſuperſeded the ancient action of *detinue*, and lies not only where goods are converted which come to a man's poſſeſſion by *actual* finding, but alſo where goods are converted which come to his poſſeſſion by a finding in law, as a delivery of goods to him, or the like.

If any of the goods of A. have been taken by B. in ſuch a tortious manner that an action of treſpaſs *vi et armis* would lie, an action of trover does likewiſe lie; but A. can only recover in the latter action damages for the converſion of the goods; for he does by bringing this, wave his right to recover damages for the force uſed in the taking o. them.

Cro.

Cro. Ja. 50. *Cro. Car.* 89. 1 *Mod.* 31. *Str.* 128.

If the plaintiff in an action of trover, has recovered damages to the value of the goods for the converſion of which the action is brought, the property in the goods does inſtantly veſt in the defendant; and it would indeed be highly unreaſonable, that he who has recovered damages to the value of his goods ſhould afterwards retain any property therein. *Str.* 1078.

A demand is abſolutely neceſſary to this action before it is brought.

TRUSTEES. If my feoffee in truſt for me refuſes to execute the truſt, I have no remedy but in chancery; but if he infeofs another, an action on the caſe lies. 1 *Roll. Abr.* 108. 2 *Vent.* 27. See ASSIGNMENT.

TYRANNY. See MAGISTRATES.

V. and U.

VIOLENT PRESUMPTION. See EVIDENCE.

VOLUNTARY *agreements and conveyances.* See AGREEMENTS.

USURY. By the *12th Ann. ſt.* 2. *c.* 16. all contracts for taking more than 5l. per cent. per ann. intereſt, are void in themſelves, and the lender ſhall forfeit treble the money borrowed.

W.

WAGER. If two perſons do each depoſit a ſum of money in the hands of a third perſon by way of a wager, he who wins the money may maintain an action of trover for the whole money, if the ſtake-holder refuſe to deliver it to him. *Cro. Eliz.* 870. See GAMING.

WAIFS. Waifs are goods which are ſtolen and waived by a thief on his being purſued, for fear of being apprehended, which are forfeited to the king, or the lord of the manor; and the king's officer, or bailiff to the lord, may ſeize and keep them, except the owner himſelf make freſh purſuit, and convict the felon, to have reſtitution. The law makes this forfeiture as a puniſhment to the owner of the goods for not purſuing the felon, and bringing him to juſtice; but if

if the felon had not the goods in his cuſtody and poſſeſſion when he fled there is no forfeiture, and the owner may ſeize them where he finds them, without any freſh purſuit. 5 *Rep.* 109. *Cro. Eliz.* 694. 21 *H.* 8.

If a felon leaves ſtolen goods with an intent to fetch them at another time, theſe are not waived; but if he be purſued, and leaves them, they are waived. *Moor ca.* 785.

WARRENS. If conies eat up another man's corn, &c. no action will lie for it; but the owner of the corn may kill them. Deſtroying of conies, or digging up of coney burrows, is not waſte in the leſſee of a warren. 5 *Rep.* 104. 1 *Cro.* 548. *Noy* 70.

If A. has a right of free-warren in the land of B. and B. deſtroys his coney burrow, B. is not liable to an action of treſpaſs; but the remedy of A. is by an action on the caſe. 2 *Roll. Abr.* 552.

WASTE. See HOUSES.

WATERCOURSE. See MILLS and NUSANCES.

WAY. If a man ſtops up a way, whether a caſt way or foot way, to which others have a right, which can be proved, an action lies.

WHARFINGER. See CARRIER.

WHOLE-BLOOD. See DESCENT.

WIFE. See BARON and FEME, and BOND.

WINE *adulterating*. If A. B. draws wine out of the veſſel of C. D. and afterwards fills up this veſſel with water, an action of treſpaſs lies, for by ſo doing the reſidue of the wine is ſpoiled. *Fitz. N. B.* 88.

WITNESSES. See EVIDENCE.

WOMAN. See FORCE.

WORDS *ſlanderous*. See SLANDER.

WRITINGS. The ſtealing of writings relating to a real eſtate is no *felony*, but a *treſpaſs*. *Stra.* 1137. And by the Common Law, bonds, bills, and notes were held to be ſuch goods whereof larciny might be committed. 8 *Rep.* 33. But by the 2 *Geo.* 2. *c.* 25 they are put upon the ſame footing with reſpect to larcinies as the monies they were meant to ſecure.

ADDENDA.

ADDENDA.

THE doctrine of the laws relating to coſts, are in a variety of reſpects much altered by ſeveral ſtatutes which have been made to remedy the defects of the Common Law, by pointing out the ſeveral caſes *in* which the expences of a ſuit are to be allowed, and in ſome inſtances the quantum or meaſure of ſuch allowances. Upon the head therefore of coſts, I ſhall firſt point out the general doctrine of the Common and Statute Laws relating to the allowance or non-allowance of coſts; and in the ſecond place, point out, as near as may be, the amount of an attorney's charge in the proſecution or defence of a ſuit in the ſeveral ſtages and circumſtances of it.

Firſt, As to the allowance or non-allowance of coſts, it is enacted by the 43 *of Eliz. c.* 6. that if upon actions perſonal in the courts at Weſtminſter, not being for any title or intereſt of lands, nor concerning the freehold nor inheritance of any lands, nor for any battery, it ſhall appear that the debt or damages ſhall not amount to 40s. or above, no more coſts than the debt or damages amount to ſhall be awarded, but left at the diſcretion of the court. And by the 22 & 23 *Car.* 2. *c.* 9. *ſ.* 136. in all actions of treſpaſs, aſſault and battery, &c. perſonal actions, wherein the judge at the trial ſhall not find and certify under his hand upon the back of the record, that an aſſault and battery was ſufficiently proved, or that the freehold or title of the land mentioned in the plaintiff's declaration was chiefly in queſtion, if the jury find damages under 40s. the plaintiff ſhall not recover more coſts than the damage, and if more coſts are given, the judgment ſhall be void, &c. and the defendant may have his action for ſuch vexatious ſuit.

As the words in the act, *other perſonal actions*, were conſtrued to extend no farther than to caſes where the judge was permitted to certify, which was only in battery, and actions of

of treſpaſs relating to the freehold, and things fixed to the freehold, therefore in trover, or in an action of treſpaſs *of carrying away* of goods and chattels not fixed to the freehold, the plaintiff ſhall have his full coſts, though the damages be found under 40s. and though the judge does not certify. 1 *Salk.* 208. For the 22 & 23 *Car.* 2. *c.* 9. extends only to ſuch actions of treſpaſs where the freehold may come in queſtion. *Stra.* 551.

So in treſpaſs for breaking his cloſe, and impounding his cattle, the plaintiff ſhall have full coſts; for the impounding his cattle is an injury to his *perſonal* property, in which no right of freehold can come in queſtion. 3 *Mod.* 39.

But in treſpaſs *for breaking his cloſe* and putting ſtakes in the plaintiff's ground, it was held within the ſtatute; for the treſpaſs is to the freehold. 2 *Vent.* 48.

And if there be a treſpaſs upon the freehold, and likewiſe a count laid of goods carried away in order merely to put in for coſts, without there is evidence that goods were carried away, if the defendant is found guilty of the treſpaſs to be freehold, yet if the damages be under 40s. the plaintiff ſhall have no more coſts than damages. 1 *Vent.* 180, 195.

Where *by the pleading* it appears that the title or intereſt of the lands is in queſtion, there is no need of the judge's certificate; ſo if the defendant juſtifies by any thing that brings the title of the land in queſtion, the judge need not certify to entitle the plaintiff to his coſts. 2 *Mod.* 141, 142.

By the 8 & 9 *W.* 3. *c.* 11. In all actions of treſpaſs wherein, at the trial of the cauſe, it ſhall appear, and be certified by the judge, that the treſpaſs was wilful and malicious, the plaintiff ſhall recover not only his damage, but his full coſts, any former law to the contrary notwithſtanding.

If an action be commenced in an inferior court, and removed into the courts of Weſtminſter, the plaintiff ſhall have full coſts, although the damages are under 40s. 7 *Mod.* 129. 4 *Mod.* 378. But ſee 2 *Lev.* 124.

2. *Slander.*

By the 21 *Jac.* 1. *c.* 16. where the damages in ſlander are found under 40s. the plaintiff ſhall recover no more coſts than damages.—It is ſaid the jury are not bound by the ſtatute, and that they may give 10l. coſts where they give but 10d. damages. 1 *Salk.* 207.

It

It is held that this act extends not to ſlander of title. *Cro. Car.* 141.

So if one call another thief, and cauſe him to be arreſted, &c. and the defendant is found guilty of both it is not within the act. *Cro. Car.* 163, 307.

So where the action is for a ſpecial damage received by words not otherwiſe in themſelves actionable, as the plaintiff was obliged to prove the ſpecial damage, otherwiſe the action would not lie for the words, though the damages are under 40s. the plaintiff ſhall have full coſts. 1 *Salk.* 206. 7 *Mod.* 129. 8 *Mod.* 371.

3. *Aſſault and Battery.*

If a man brings treſpaſs for beating his ſervant, *by which he loſt his ſervice*, this not being an action of aſſault and battery within the above ſtatutes, but founded upon the ſpecial damage, the plaintiff ſhall have full coſts. 1 *Salk.* 206. 5 *Mod.* 74.

4. *Where Coſts ſhall be doubled or trebled.*

Where damages were before recoverable, and a ſtatute increaſes them to double or treble the value, the plaintiff ſhall recover his double or treble damages; and coſts alſo, as parcel of the damages ſhall be trebled. 10 *Co.* 116. 2 *Inſt.* 289. *Hard.* 152. *Carth.* 297. But where a ſtatute gives damages where there were none recoverable before, as upon the ſtatute 2 *E.* 6. for not ſetting forth tithes, there no coſts at all ſhall be had; becauſe nothing ſhall be had but what is given by the ſtatute. 1 *Inſt.* 285. 1 *Salk.* 205. *Carth.* 297. But ſee the above ſtatute, 8 & 9 *W.* 3. *c.* 11.

In an action for a forcible entry upon the 8 *H.* 6. *c.* 9. which gives treble damages, the plaintiff ſhall recover treble coſts alſo. 2 *Inſt.* 289. 10 *Co.* 116. 1 *Vent.* 22. And the coſts of *increaſe*, as well as thoſe given by the jury, ſhall be trebled. *Cro. Eliz.* 582. 1 *Leon.* 282. 2 *Leon.* 52. 3 *Lev.* 352.

In an action of debt upon the 1 & 2 *Ph.* & *M.* *c.* 12. of diſtreſſes, no coſts are to be given. 2 *Inſt.* 289. 1 *Roll. Abr.* 516. And in an action of waſte againſt tenant for life, or years, by the ſtatute of *Glouceſter*, *c.* 6. the place waſted and treble damages ſhall be recovered, but no coſts. 2 *Inſt.* 289. But ſee the above ſtatute, 8 & 9 *W.* 3. *c.* 11. But in waſte againſt tenant in dower, treble damages and coſts alſo ſhall be recovered. 2 *Inſt.* 289.

In an action on the caſe for a reſcous upon the ſtatute 2 *W. & M. c.* 5. the plaintiff ſhall recover treble coſts. 1 *Salk.* 205. *Carth.* 321. *Ld. Raym.* 19.

5. *Defendant's Coſts.*

By ſeveral ſtatutes in almoſt every caſe where the plaintiff is non-ſuited, or where the verdict paſſes againſt him, the defendant ſhall recover his coſts. And by the 8 & 9 *W.* 3. *c.* 11. in treſpaſs, aſſault, falſe impriſonment, or ejectment, againſt ſeveral, if any one or more is acquitted by verdict, every ſuch perſon ſhall recover his coſts, unleſs the judge ſhall immediately after trial, in open court certify upon record, that there was a reaſonable cauſe for making ſuch perſon defendant.

6. *Who are intitled to, or exempt from paying Coſts.*

1. *Of Executors, &c.*

An executor, defendant, pays coſts in all caſes, and the judgment is *of the goods of the teſtator, if, &c. and if not, then of his proper goods*; alſo when he is defendant, and there is judgment for him, he ſhall have his coſts. 31 *H.* 6. 13. *Plowd.* 183. *Cro. Eliz.* 503. *Hut.* 69, 79.—But an executor defendant in equity ſhall not pay coſts, for he cannot plead it at law in excuſe of aſſets. *Hard.* 165. *and note*, that in equity the coſts are uſually awarded out of the aſſets. *Eq. Abr.* 125.

If executors or adminiſtrators bring an action in their own right, as, for a converſion or treſpaſs in their own time, they ſhall pay coſts. 11 *Mod.* 135, 174. altho' they name themſelves executors, for it is but ſurpluſage. 1 *Vent.* 92. But ſee 3 *Lev.* 60.

But if an executor brings an *indebitatus* upon an account made in his time, it is in the right of his executorſhip, and he ſhall pay no coſts. 2 *Lev.* 165. 2 *Jones* 47.

So if the goods of the teſtator be taken and converted before they come to the hands of the executor, he ſhall not pay coſts upon a nonſuit in an action brought for theſe; *for, they were never aſſets.* 1 *Salk.* 208.

If an adminiſtrator brings an action on the caſe in the Common Pleas, and there is a verdict and judgment againſt him, and thereupon he brings a writ of error in the King's Bench, where the judgment is affirmed; yet he ſhall not pay coſts, for he is not a perſon within the intent of the ſtatute which gives coſts in this caſe, altho' it was objected, that it

was his own act, and lay in his own knowledge, and was brought *in delay of execution.* 4 *Mod.* 244. If it be brought after a *devaſtavit* he ſhall pay coſts. 2 *Stra.* 977. 2 *Barnard. K. B.* 450. An adminiſtrator diſcontinues without coſts. 2 *Stra.* 871.

2. *Officers and miniſters of juſtice.*

By the 7 *Jac.* 1. *c.* 5. If any action upon the caſe, treſpaſs, battery or falſe impriſonment, ſhall be brought in the courts of Weſtminſter, or elſewhere, againſt any juſtice of peace, mayor, bailiff of city or town corporate, head-borough, portreeve, mayor, bailiff, conſtable, tithing-men, collectors of fifteenths and ſubſidies, concerning any thing done by virtue of their office, they, their ſervants, &c. may plead the general iſſue, &c. and if the verdict ſhall be for the defendant, or the plaintiff become non-ſuit, or diſcontinues, the juſtice or judge before whom the matter is tried, ſhall allow the defendant double coſts. They cannot be allowed unleſs the judge of aſſize marks the *poſtea.* 2 *Vent.* 45. 2 *Lev.* 251. *Winch.* 16. And by 21 *Jac. c.* 12. churchwardens and overſeers are included in the above ſtatute.

3. *Informers.*

A common informer upon a popular ſtatute, can in no caſe recover coſts, unleſs they be expreſsly given by ſuch ſtatute. 2 *Keb.* 781. 1 *Roll. Abr.* 544. 1 *Lutw.* 200. But in an action on a ſtatute by the *party grieved*, for a certain penalty given by ſuch ſtatute, the plaintiff ſhall recover coſts. 1 *Jones* 447. *Cro. Car.* 559. And no coſts ſhall be recovered in an action on a ſtatute which gives no certain penalty to the party grieved, but only his damages in general; but the jury may give the plaintiff full ſatisfaction by way of damages. 1 *Roll. Abr.* 574. 1 *Salk.* 206.

And as to coſts againſt informers, by the 24 *H.* 8. *c.* 8. the defendant ſhall recover no coſts on non-ſuit or verdict, when the plaintiff ſues to the king's uſe. But by the 18 *Eliz. c.* 5. if any informer or plaintiff on a penal ſtatute, ſhall willingly delay his ſuit, or ſhall diſcontinue, or be non-ſuit therein, or ſhall have the trial or matter paſſed againſt him therein by verdict or judgment of law; ſuch informer or plaintiff ſhall pay to the defendant his coſts, charges and damages, to be aſſigned by the court, in which the ſame ſuit ſhall be attempted, &c.—This ſtatute is conſtrued to extend only to common informers, who are to have the whole benefit of the penalty, and not where

the penalty is given to the party grieved, or part to the king and part to him who will ſue for it. 1 *And.* 116. 1 *Salk.* 30.

Upon informations exhibited, if the informer do not within a year after iſſue joined try the ſame; or if a verdict be given for the defendant, or if the informer procure a *nolle proſequi* to be entered, the defendant ſhall have his coſts, unleſs the judge certify that there was reaſonable cauſe for exhibiting ſuch information. 4 *and* 5 *W. and M. c.* 18.

No coſts can be had on this ſtatute on an acquittal at a trial at bar, but at *niſi prius.* 2 *Hawk. P. C.* 263. Alſo if there are ſeveral defendants and ſome of them are acquitted, and others convicted, none of them can have coſts. 1 *Salk.* 194.

4. *Paupers.*

By the 23 *H.* 8. 15. he that ſues *in forma pauperis*, ſhall not pay coſts, but ſhall ſuffer ſuch other puniſhment as the court ſhall think fit. But notwithſtanding this ſtatute, if he be diſpaupered, or non-ſuited, the uſual practice is to tax the coſts, and for non-payment to order him to be whipped. 1 *Roll. Rep.* 88. 2 *Salk.* 506. *Holt Ch. J.* ſaid on a motion to whip a pauper, there is no officer for the purpoſe, nor did I ever know it done. 1 *Salk.* 506.

5. *Of coſts in replevyn.*

By the 7 *H.* 8. *c.* 4. Every avowant and perſon that makes cognizance, or juſtifies, as bailiff in replevyn, or ſecond deliverance for any rent, cuſtom or ſervice: if their avowry, cognizance or juſtification be found for them, or the plaintiffs otherwiſe barred, they ſhall recover their damages and coſts, as the plaintiff ſhould have done if he had recovered. This ſtatute is conſtrued not to extend where avowry damage-feaſant. *Dyer* 141. *Owen* 14. Nor for a rent charge. *Owen* 14. Nor to a non-ſuit, 1 *Jones* 423.

And by the 21 *H.* 8. every avowant or other perſon making juſtification or cognizance, as bailiff or ſervant in replevyn, or ſecond deliverance for rents, cuſtoms, ſervices, damage-feaſant, or other rent or rents, if the avowry, cognizance or juſtification be found for them, or the plaintiff be non-ſuit or otherwiſe barred, they ſhall recover damages and coſts, as the plaintiff's ſhould have done.

There are no coſts in replevyn for the defendant, if the plaintiff confeſſes the plea in abatement to be true. 2 *Ld. Raym.* 788.

6. *Of*

6. *Of coſts in a writ of error.*

By the 3 *H.* 7. *c.* 10. if a defendant or others bound thereby, before execution had, bring any writ of error in delay of execution, and the judgment be affirmed, or the writ of error diſcontinued thro' the default of the party, or the plaintiff therein be non-ſuit in the ſame, the party againſt whom the writ of error is ſued ſhall recover his coſts and damages by the diſcretion of the judge.

This act extends not to executors or adminiſtrators, where they bring error upon a judgment againſt their teſtator, or upon a judgment againſt themſelves, for being in another's right they are not preſumed to bring the writ of error for delay. 1 *Vent.* 166. 1 *Mod.* 77. 3 *Lev.* 375. 8 *Mod.* 108. But ſee *Barnes* 110.

There are no coſts by this act where execution is executed for then there can be no delay of execution. *Cro. Jac.* 636. *Cro. Car.* 401. Hence there can be no coſts in a writ of error upon a judgment in ejectment, where execution was executed as to the coſts and damages, tho' not as to the term. 1 *Vent.* 88.

Alſo by the 13 *Car.* 2. *ſt.* 2. *c.* 2. if any proſecute a writ of error for reverſal of a judgment after verdict in the courts of *Weſtminſter*, counties palatine of *Cheſter*, *Lancaſter* or *Durham*, or the great ſeſſions in *Wales*, and the judgment is affirmed, they ſhall pay double coſts; popular actions upon penal laws (except debt for tithes) indictment, informations, &c. excepted.

But as theſe ſtatutes do not extend to caſes where the plaintiff brings a writ of error, therefore by the 8 *and* 9 *W.* 3. *c.* 10. if in any action, &c. upon demurer by plaintiff or defendant, judgment ſhall be given for the defendant; or if after judgment for the defendant in ſuch action, &c. the plaintiff ſhall bring error, and the judgment ſhall be affirmed, the writ of error diſcontinued, or the plaintiff non-ſuit, the defendant ſhall have judgment for his coſts, and execution for the ſame by *capias ad ſatisfaciendum*.

7. *Of coſts in the ſeveral proceedings of a cauſe.*

In general, the delays or contempts, which either party is guilty of, can only be remitted or purged on payment of coſts. As on amendments, diſcontinuances, non-ſuits, &c. 12 *Mod.* 560. 1 *Leon.* 105. *Hutt.* 36. *Stat.* 8. *Eliz. c.* 2.

2. *Of taxation, and the meaſure of coſts allowed thereon.*

The method of taxing bills of coſts 'till of very late, was by the attorney of the party delivering a compleat and regular bill to the maſter or prothonotary, who was at liberty to allow or diſallow as much as he thought reaſonable and proper, placing his deductions in the margin of the bill; but now, for the eaſe of all parties, a particular ſum is allowed in ſuch and ſuch ſtages of a cauſe, altering the allowance according to the peculiar circumſtances and proceedings of a ſuit, to which the maſter has power to add any ſuch extraordinary charges as the party has been put to: Thus, the common coſts in the court of King's Bench where the declaration is ten ſheets, and the iſſue fourteen, are 16*l.* 10*s.* And on a writ of inquiry where the declaration is folio 10. the plaintiff is allowed 7*l.* 10*s.* When ſeventeen ſheets 8*l.* 10*s.* And when thirty-four ſheets 13*l.* 10*s.* And on a judgment by default in debt on a bond 4*l.* 10*s.* is allowed. The defendant where the declaration is thirteen ſheets, and the iſſue is ſeventeen, is allowed 9*l.* on a verdict in his favour.

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